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Reducing the Environmental Impact of CERCLA

John C. Buckley

REDUCING THE ENVIRONMENTAL IMPACT OF CERCLA

JOHN C. BUCKLEY*

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* Associate, Miles & Stockbridge, Baltimore, Maryland. B.S., Pennsylvania State University, 1980 (Environmental Engineering); J.D., University of South Carolina School of Law, 1989. Mr. Buckley is a registered Professional Engineer and is admitted to the Bar in North Carolina and Maryland.

I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act[1] (CERCLA, also known as

1. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987)) [hereinafter CERCLA]. *See generally* Jones & McSlarrow, . . . *But Were Afraid to Ask: Superfund Case Law 1981-1989*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10430, 10430 (Oct. 1989) (for " an exciting dash through the case law of the last eight years"); Note, *CERCLA 1980-1985: A Research Guide*, 13 ECOLOGY L.Q.

"Superfund") at the height of public concern during the Environmental Decade.[2] Even before its implementation, CERCLA was touted as the most frightening[3] and promising[4] of all environmental statutes. In retrospect, both of the early predictions ring true. In fact, CERCLA represents the product of a Congress unable to collect its thoughts.[5] Nonetheless, CERCLA *is* effective—devastatingly so.[6]

This Article proposes that zealous application of pervasive CERCLA liability results in an undesirable environmental impact in that the Act causes the unnecessary selection of undeveloped land as the situs for future industrial growth. To address this concern, the Article begins by defining in some detail the broad range of CERCLA liability and demonstrating the extraordinary difficulty of avoiding the CERCLA trap. The focus then turns to a description of the various responses of parties affected by CERCLA liability as they have attempted to ameliorate the negative impacts of this absolute liability. As will be explained, much of this amelioration actually increases the

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311 (1986).

2. Although "Environmental Score" seems more accurate on the twentieth anniversary of the passage of the National Environmental Policy Act (NEPA), "Environmental Decade" still is commonly used. *E.g.*, Note, *Federal Preemption of Local PCB Ordinance Under the Toxic Substance Control Act*—Rollins Environmental Services (FS), Inc. v. Parish of St. James, 35 U. KAN. L. REV. 461 (1987).

3. *A Legal Time Bomb for Corporations*, BUS. WK., June 16, 1980, at 150.

4. *See* Wicker, *Beginning the Cleanup*, N.Y. Times, Nov. 30, 1980, at E17, col.2.

5. *See In re* Acushnet River & New Bedford Harbor Proceedings *Re* Alleged PCB Pollution, 675 F. Supp. 22, 25 n.2 (D. Mass. 1987) (CERCLA is a prominent member of that group of statutes which "achieve a certain quirky notoriety precisely because they are so badly drafted as to be virtually incomprehensible."); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983) (CERCLA's awkwardness "may be explained by the context of [its] passage. CERCLA was rushed through a lame duck session of Congress, and therefore, might not have received adequate drafting."); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) ("[CERCLA] leaves much to be desired from a syntactical standpoint, perhaps a reflection of the hasty compromises. . . . [T]he legislative history is unusually riddled by self-serving and contradictory statements."); *see also* Jones & McSlarrow, *supra* note 1, at 10430 ("[CERCLA was] both badly drafted and, to the glee of lawyers, silent on many important issues."); Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133, 1138 (1986) ("the statute is widely recognized as bearing the earmarks of hasty drafting and last-minute political compromise").

6. Mulcahy, *Free Market EIL Initiatives Urged*, NAT'L UNDERWRITER, Mar. 23, 1987, at 5 " 'The statutes have cost carriers and insureds a bundle, but they've been extremely effective in cleaning up sites.' " *Id.* (quoting Michael Murphy, CEO, Environmental Strategies Corp., an environmental risk management firm based in Washington, D.C.).

consumption of undeveloped land.[7] Finally, the Article presents a draft proposal for preventing this needless consumption while retaining the full positive force of CERCLA liability.

II. DEFINING CERCLA LIABILITY

A. *How Does CERCLA Work?*

CERCLA imposes strict liability on statutorily identified parties. These parties are known as "responsible parties." Among these parties, liability is joint and several unless the harm caused is divisible.[8] Upon the passage of CERCLA, the Environmental Protection Agency (EPA) received a Congressional mandate to identify polluted sites at which cleanup is necessary.[9] The press commonly refers to these sites as Superfund sites, although CERCLA refers to them as facilities.[10] The EPA then must rank the sites in cleanup priority,[11] which is set through a methodology known as the Hazard Ranking System (HRS).[12]

After ranking, the EPA attempts to identify Potentially Responsible Parties (PRPs) for each site. If site conditions permit, the EPA will grant the PRPs time to negotiate a cleanup plan among themselves. If the PRPs are unable to resolve their differences and cleanup the site themselves, or if the EPA determines health concerns require undelayed cleanup, then the EPA will take prompt action.

This action can take the form of a cleanup order issued to any one of the PRPs,[13] or, alternatively, the EPA may issue a contract to have the site cleaned using government funds. In the latter case the Hazard Response Trust Fund, the so-called "Superfund," supplies the money

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7. *See infra* pp. 807-12; *see also* Shumate, *Environmental Law: An Emerging Threat to Financial Institutions*, BANK ADMIN., Feb. 1987, at 45 ("the cure may be almost as bad as the disease").

8. CERCLA § 107, 42 U.S.C. § 9607 (1982 & Supp. V 1987) (liability of responsible parties); *see* Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1316 (9th Cir. 1986) ("Congress imposed strict but not absolute liability under CERCLA."); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 994 (D.S.C. 1984) (CERCLA liability is joint and several unless defendant proves grounds for division).

9. *See* CERCLA § 105, 42 U.S.C. § 9605 (1982 & Supp. V 1987).

10. *See* CERCLA § 101(9), 42 U.S.C. § 9601(9) (1982 & Supp. V 1987).

11. CERCLA § 105(b), 42 U.S.C. § 9605(b) (Supp. V 1987).

12. CERCLA § 105(c), 42 U.S.C. § 9605(c) (Supp. V 1987).

13. CERCLA § 106(a)-(b), 42 U.S.C. § 9606(a)-(b) (1982 & Supp. V 1987). These sections authorize the EPA to require cleanup of the site and to impose fines of up to $25,000 per day for failure to comply. Additionally, noncomplying PRPs are subject to triple the amount the EPA incurs in cleaning up the facility. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1982 & Supp. V 1987).

to pay for the cleanup.[14] The EPA then may sue all or any one of the PRPs it selects for recovery of the entire amount expended on the site.[15] The selected PRP then has an action for contribution against other PRPs, but it must bear the burden of proving its case.[16]

The EPA bases its selection of a defendant on two criteria. First, the EPA considers its own ability to prove its case against the PRP. Second, it considers the PRP's ability to compensate the fund.[17] Proving the case requires that the EPA show:

(1) the site meets the broad definition of "facility";[18]

(2) there is a release[19] or threatened release[20] of

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14. *See* CERCLA § 104, 42 U.S.C. § 9604 (1982 & Supp. V 1987).

15. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. V 1987). The text of the statute reads:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

16. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1982 & Supp. V 1987).

17. McMahon, *Lender's Perspectives on Hazardous Waste and Similar Liabilities*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10368, 10369 (Sept. 1988) (noting that it is "self-evident" that the government will seek the deep pocket).

18. The definition of facility is so broad as to include almost anything except watercraft and consumer products in consumer use, which are specifically excluded. *See* CERCLA § 101(9), 42 U.S.C. § 9601(9) (1982 & Supp. V 1987).

19. CERCLA § 101(22), 42 U.S.C. § 9601(22) (1982 & Supp. V 1987).

20. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1982 & Supp. V 1987).

(3) a "hazardous substance";[21]

(4) the defendant is a "covered person";[22] and

(5)the plaintiff (usually the EPA) incurred costs of response[23] consistent with the National Contingency Plan (NCP).[24]

A "covered person" includes anyone who owns or operates the site.[25] An owner or operator of the site can include lessees, sublessors,[26] innocent purchasers who acquired property without knowledge of existing contamination,[27] lenders who foreclosed on mortgages[28] or who became involved in operations,[29] and even municipalities that simply contracted for landfill services.[30]

The EPA's proof for liability is relatively easy to demonstrate. It follows that "ability to prove the case" is not a significant criterion in the selection of a particular PRP to sue. Therefore, the remaining criterion, size of assets, becomes determinant. Hence, CERCLA has acquired the propensity for being called a deep pocket nightmare.[31]

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21. CERCLA § 101(14), 42 U.S.C. § 9601(14) (1982 & Supp. V 1987).

22. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. V 1987).

23. CERCLA § 101(25), 42 U.S.C. § 9601(25) (1982 & Supp. V 1987).

24. CERCLA § 105, 42 U.S.C. § 9605 (1982 & Supp. V 1987). Consistency with the National Contingency Plan (NCP) arguably means something different for the government than it does for a private plaintiff. When the EPA is the plaintiff, the defendant has the burden of demonstrating some inconsistency with the NCP. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 747 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). In a case between private litigants, the plaintiff must show his remedial action (1) provided for appropriate site investigation and analysis of remedial alternatives; (2) complied with the NCP format for Remedial Investigations (RI's); (3) constituted a cost effective response; and (4) provided an opportunity for public comment. 40 C.F.R. § 300.71(a)(ii) (1989). *See* Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1575 (E.D. Pa. 1988); Martin, Lucy & Green, *Private Cost-Recovery Actions under CERCLA* § 107, 1 ENVTL. CLAIMS J. 377 (1989).

25. CERCLA § 107(a)(2), 42 U.S.C. 9607(a)(2) (1982 & Supp. V 1987).

26. *See* United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1003 (D.S.C. 1984).

27. *See infra* notes 129-39 and accompanying text.

28. *See infra* notes 145-53 and accompanying text.

29. *See infra* notes 154-60 and accompanying text.

30. Under section 101(21) a "person" for the purposes of the statute includes a "State, municipality, commission, [and] political subdivision of a State." CERCLA § 101(21), 42 U.S.C. § 9601(21) (1982 & Supp. V 1987). A state or municipality that acquires title to a facility involuntarily, however, (*e.g.*, through tax delinquency) is exempt from CERCLA liability unless the municipality "has caused or contributed to the release . . . [and] such a State or local government shall be subject to the provisions of this chapter . . . including liability under section 9607." CERCLA § 101(20)(d), 42 U.S.C. § 9601(20)(d) (Supp. V 1987). *See* Artesian Water Co. v. New Castle County, 659 F. Supp. 1269 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1983); City of Philadelphia v. Stepan Chem. Co. 544 F. Supp. 1135 (E.D. Pa. 1982).

31. Many PRP's have identified concern with the EPA's "selective pursuit of the deep pocket companies regardless of how much they contributed to the problem." Ren-

Potentially Responsible Parties are liable for (1) costs to the government of removal or remedial action, (2) costs of response incurred consistent with the NCP, (3) damages to natural resources, and (4) costs for any health assessments.[32] The potential for extensive liability is so great and the number of litigants so many,[33] otherwise burdensome individual litigation costs are often considered nominal.[34] This creates a willingness to litigate *ad nauseam* the damages issue, thus leading to CERCLA's reputation as a litigious morass. Recognizing this problem, Congress amended CERCLA in 1986 and sought to promote settlements by permitting the government to grant various forms of release agreements.[35] The EPA, however, has nonreviewable discretion[36] in making such settlements, and often the release agreements include "reopener clauses."[37]

Several defenses or partial barriers to liability may be available to CERCLA defendants or PRPs, but these have very narrow application. The statute expressly defines three defenses: (1) act of God;[38] (2) act of war;[39] and (3) act or omission of a third party.[40] Note that these de-

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nie, *Superfund Disputes and the Role of Clean Sites, Inc.*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10263, 10265 (July 1987)).

32. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1982 & Supp. V 1987).

33. Practitioners should be wary that the "sheer numerosity of parties" in a CERCLA action creates significant opportunity for conflicts of interest. Smith, *Legal Ethics: Conflicts of Interest in a CERCLA Matter*, in THE IMPACT OF ENVIRONMENTAL REGULATION ON BUSINESS TRANSACTIONS: A SATELLITE PROGRAM (Practicing Law Institute Real Estate Law and Practice No. 316) 211, 213 (A. Nucciarone ch. 1988) [hereinafter IMPACT OF ENVIRONMENTAL REGULATIONS No. 316].

34. For example, an expenditure of $400,000 just to identify other PRPs was considered a "prudent investment" in a case involving $80 million in cleanup costs. *See* Graham, *Minimizing Legal and Cleanup Costs at Hazardous Waste Sites*, in PRACTICAL APPROACHES TO REDUCE ENVIRONMENTAL CLEANUP COSTS (Practicing Law Institute Real Estate Law and Practice No. 317) 29, 44 (M. Italiano & D. Telego chs. 1988).

35. *See* CERCLA § 122, 42 U.S.C. § 9622 (Supp. V 1987) (as added by the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1678 (1986)).

36. *Id.*

37. *See, e.g.*, Cook & Gruenthal, *Federal and State Superfund and Settlement Provisions*, in THE LAWS OF HAZARDOUS WASTE § 13.01[5][d], at 13-52 (1989) (citing reopener clause to consent decree for Keefe site in New Hampshire).

38. CERCLA § 107(b)(1), 42 U.S.C. § 9607(b)(1) (1982 & Supp. V 1987). The statute defines an act of God as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresitable character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." CERCLA § 101(1), 42 U.S.C. 9601(1) (1982 & Supp. V 1987).

39. CERCLA § 107(b)(2), 42 U.S.C. § 9607(b)(2) (1982 & Supp. V 1987).

40. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982 & Supp. V 1987). Practically, this defense is limited to the actions of "midnight dumpers" on another's property. Even in that case, a pattern of dumping without action by the owner to prevent the activities might lead to liability.

fenses are available only for liability arising out of section 107 that is related to section 104 response costs. The defenses are not available to defeat an EPA order to clean a site issued under authority of section 106.[41] In fact, the statute denies federal district courts jurisdiction to review orders issued under section 106.[42]

Several other defenses are scattered throughout the statute as well. One of these is the innocent landowner defense, which is simply a form of the third-party defense hidden in the definition of "contractual relationship."[43] The requirements for the defense, however, appear[44] to be so stringent that "[i]t will likely be difficult for anyone to establish a position as an innocent landowner."[45] One case in which the defense was invoked successfully is *United States v. Pacific Hide & Fur Depot, Inc.*[46] The case involved five relatives of the site's former owner who received title through stock transfer and quitclaim deed. The court held that the innocent landowner defense was applicable because the defendants neither knew nor had reason to know of PCB releases at the site.[47] Lack of knowledge, however, may be difficult for most defendants to establish.

Other potential defenses include a "federally permitted release,"[48] an excluded release,[49] a response action contractor defense,[50] a right to contribution from other PRPs,[51] a de minimis settlement,[52] and bank-

41. Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d. Cir. 1986) (holding that federal district courts lack subject matter jurisdiction to review section 106 orders).

42. *See* CERCLA § 113(h), 42 U.S.C. § 9613(h) (Supp. V 1987). An action by the EPA to enforce a section 106(a) order, however, is subject to review. *See* CERCLA § 113(h)(2), 42 U.S.C. § 9613(h)(2) (Supp. V 1987).

43. *See* CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (Supp. V 1987).

44. The language is so nondescript that Representative Weldon (R-Pa.) recently introduced a bill (H.R. 2787) that would establish specific guidelines for a purchaser to follow. For Representative Weldon's comments on the bill, see 135 CONG. REC. E2367 (daily ed. June 28, 1989).

45. R. Marzulla, *Keynote Address*, in BURDENS OF ENVIRONMENTAL REGULATION ON PRIVATE PROPERTY OWNERSHIP AND BUSINESS TRANSACTIONS: REASONABLE OR UNREASONABLE?, PROCEEDINGS OF THE SIXTEENTH ANNUAL CONFERENCE ON THE ENVIRONMENT, MAY 15-16, 1987, at 3 (ABA 1988) [hereinafter BURDENS OF ENVIRONMENTAL REGULATION].

46. 716 F. Supp. 1341 (D. Idaho 1989).

47. *Id.* at 1348-49.

48. CERCLA § 101(10), 42 U.S.C. § 9601(10) (1982 & Supp. V 1987).

49. CERCLA § 101(22)(A)-(D), 42 U.S.C. 9601(22)(A)-(D) (1982 & Supp. V 1987).

50. CERCLA § 119(a), 42 U.S.C. § 9619(a) (Supp. V 1987) This defense provides that an entity contracting with the EPA under section 104 shall not be liable for damage caused by the release necessitating the response action. The defense, however, is not applicable if the response contractor causes the release through negligence, gross negligence or intentional misconduct. CERCLA § 119(b), 42 U.S.C. § 9619(b) (Supp. V 1987).

51. CERCLA § 113(f), 42 U.S.C. § 9613(f) (1982 & Supp. V 1987).

52. CERCLA § 122(g), 42 U.S.C. § 9622(g) (1982 & Supp. V 1987). For an example summary of a de minimis settlement, see Notice of Proposed Consent Decree pertaining

ruptcy.[53] Despite these additional defenses, however, CERCLA liability remains a virtually invincible force.

B. Liability Standard

Although CERCLA expressly specifies who is liable for cleanup costs it fails to establish the standard for liability.[54] Initially, the argument was raised that liability should attach only when the plaintiff has proven negligence.[55] Courts rejected this argument, however, and since established that "strict" liability applies.[56]

One way to approach CERCLA liability is by comparison to the common law tort liability analysis of duty, breach, causation and damages. The comparison highlights the differences between CERCLA's apparent strict liability and other less adhesive schemes of imposing liability.

1. Duty: Hazardous Substances

CERCLA imposes multiple duties.[57] It exacts the most significant

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to United States v. Adac, No. 89-0306S (D. Mass. Feb. 9, 1989), in 54 Fed. Reg. 7,489 (1989) (consent decree filed with district court on Feb. 9, 1989).

53. Ohio v. Kovacs, 469 U.S. 274 (1985). The *Kovacs* court was presented with the question of whether a person deemed liable for cleanup costs may discharge that obligation through a personal bankruptcy proceeding. The Court held that to the extent the liability represented a debt, the bankruptcy proceeding provided a discharge. *Id.* at 285. Firms that simply reorganize under Chapter 11, however, still make viable defendants. *See Johns-Manville Agrees To Pay $3 Million To Settle Federal Suit on Asbestos Cleanup*, 17 Env't Rep. (BNA) 1459 (Dec. 26, 1986).

An issue addressed by the Supreme Court in a later case was whether a trustee in bankruptcy may abandon a facility, thereby preserving the debtor's assets for the benefit of its creditors. Of course, this leaves the municipality or state to pay for the facility cleanup. In Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), the Court held that a bankruptcy court may not authorize abandonment pursuant to the Bankruptcy Code when such an abandonment would contravene state statutes designed to protect the health and safety of its citizens. *Id.* at 507. For a thorough discussion of this issue, see Note, *Bankruptcy in Trustee May Not Abandon Property in Contravention of a State Statute or Regulation That Is Designed to Protect the Public From Identified Hazards*, 12 U. BALT. L. REV. 558 (1988).

54. *See* CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (1982 & Supp. V 1987). For the text of section 107, see *supra* note 15.

55. Hayes & MacKerron, *Superfund II: A New Mandate*, 17 Env't Rep. 1735 (BNA) pt. II, at 23 (Feb. 13, 1987).

56. United States v. Monsanto Co., 858 F.2d 160, 167 n.1 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

57. CERCLA duties include the duty to report releases, CERCLA § 103, 42 U.S.C. § 9603 (1982 & Supp. V 1987), and to prevent pollutant releases which may present substantial danger to public health or welfare. CERCLA § 104(a)(1)(B), 42 U.S.C. §

duty from those who handle, or have unwittingly handled in the past,[58] a category of chemicals denoted as hazardous substances.[59] An important step in comprehending the far-reaching impact of CERCLA requires a practical understanding of the all-inclusive nature of the term "hazardous substance." The relative harmlessness of some of these "hazards" can be quite startling. Many hazardous substances are in routine household use.[60] The public handles these "hazards" without concern even though the concentrations may be much greater than exist at many Superfund sites.[61] For example, acetone[62] is a major ingredient in fingernail polish remover; benzene[63] is a major constituent of super-unleaded gasolines; and phosphoric acid[64] is an ingredient in Coca-Cola. People handle these materials, contact their skin with these materials, and indeed *consume* these materials daily; yet, the materials are deemed hazardous substances. Their use in a nonconsumer set-

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9604(a)(1)(B) (1982 & Supp. V 1987). If the pollutant involved is a designated hazardous substance, then the danger is irrebuttably presumed. *See* CERCLA § 104(a)(1)(A), 42 U.S.C. § 9604(a)(1)(A) (1982 & Supp. V 1987).

58. S. BRIGGUM, G. GOLDMAN, D. SQUIRE & D. WEINBERG, HAZARDOUS WASTE REGULATION HANDBOOK: A PRACTICAL GUIDE TO RCRA AND SUPERFUND 98 (1987) [hereinafter S. BRIGGUM].

59. CERCLA § 101(14), 42 U.S.C. § 9601(14) (1982 & Supp. V 1987) The term hazardous substance includes: all chemicals that are listed as hazardous substances or toxic pollutants under the Clean Water Act, 33 U.S.C. § 132(b)(2)(A) (1982 & Supp. V 1987); all chemicals listed as hazardous wastes under the Solid Waste Disposal Act (more commonly known by its amendment name, the Resource Conservation and Recovery Act, "RCRA"), 42 U.S.C. § 6921 (1982 & Supp. V 1987); all chemicals listed as toxic substances under the Toxic Substance Control Act, 15 U.S.C. § 2606 (1988); all chemicals listed as hazardous air pollutants under the Clean Air Act, 42 U.S.C. § 7412 (1982); and any chemicals that the EPA administrator determines to list exclusively under CERCLA. A reasonably current list of these chemicals is set out in 40 C.F.R. § 302.4 (1989).

60. Lyon, *Household Wastes Can Be Hazards, Too*, Portland Press Herald (Maine), Dec. 21, 1987 (mothballs, oven cleaner, gun-cleaning solvents, paint thinner, bug spray, furniture polish, floor-care products, kerosene, used motor oil and metal polish with solvent are all hazardous substances); *see also Study Finds Significant Hazardous Waste in Household Garbage*, INSIDE EPA WEEKLY REPORT, Oct. 9, 1987, at 15 (batteries, electrical equipment, cosmetics, and household maintenance supplies are all hazardous substances); Hamilton, *A Nasty Scrap Over Toxic Household Waste*, BUS. WK., Sept. 21, 1987, at 35 (bug spray, used motor oil and nearly dried paint cans are all hazardous substances).

61. *Cf.* McMahon, *Lender's Perspectives on Hazardous Waste and Similar Liabilities*, in BURDENS OF ENVIRONMENTAL REGULATION, *supra* note 45, at 22 ("Homeowners may have more contaminants in their garages than many companies subject to multimillion dollar cleanups have on their grounds.").

62. *See* 40 C.F.R. § 302.4 (1989).

63. *See id.*

64. *See id.*

ting[65] can subject an ever-widening range of individuals and corporations to tremendous liability.

In short, the requirement that a site contain hazardous substances is not much of a requirement. It is not unreasonable to assume that every business[66] and household[67] in America uses hazardous substances.

2. *Breach: Threat of Release*

CERCLA authorizes more than one type of action when either a hazardous substance is released or a substantial threat of release exists. First, the EPA may issue an administrative order to a responsible party to clean the site. The authority for such orders arises from section 106 of CERCLA, and requires the EPA to determine that there is substantial endangerment caused by the threat of release. Review of the Agency's determination is generally unavailable.[68] Failure to comply with such orders can result in treble damages.[69]

Alternatively, the EPA, or a private party, may choose to clean or at least secure the site themselves. This is a section 104 response, and it is generally divided into two steps. The first is a removal action, which addresses immediate public health concerns. The second, and more thorough, is the remedial action. Remedial actions involve less pressing public health concerns, but are often more costly and subject to greater review. While both parts must comply with the National Contingency Plan (NCP) to be compensable, the remedial action is a much more formal process.[70] A Remedial Investigation and Feasibility Study (RI/FS) or its equivalent is required.[71]

Both of these actions, however, require at least a "substantial

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65. *See* CERCLA § 101(9)(B), 42 U.S.C. § 9601(9)(B) (1982 & Supp. V 1987) (definition of "facility" that can be liable for production of hazardous waste under CERCLA excludes consumer products in consumer use).

66. Shea, *Protecting Lenders Against Environmental Risks*, PRAC. REAL EST. LAW., May 1987, at 11, 13 ("almost all manufacturing industries, and even some service industries, are major users of hazardous substances").

67. *See supra* note 60.

68. *See* Mays, *Who's Afraid of CERCLA § 106 Administrative Orders? or Separating the Men from the Boys*, 19 Env't Rep. (BNA) 1926, 1927 (Jan. 27, 1989) ("there is no way for a PRP to obtain speedy review of a § 106 order in U.S. district court").

69. *See* United States v. Parsons, 723 F. Supp. 757 (N.D. Ga. 1989).

70. *See* Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1576 (E.D. Pa. 1988) (The "distinction between remedial and removal actions is crucial in certain cases where the failure to fulfill the more detailed procedural and substantive provisions of the NCP with regard to 'remedial' actions becomes a barrier to recovery of response costs.").

71. 40 C.F.R. § 300.68(d) (1989). The NCP was significantly expanded on March 8, 1990. 55 Fed. Reg. 8,665 (1990).

threat of release into the environment."[72] While "release" is defined in the statute,[73] the real determination of substantial threat would seem to rest with the fact finder.[74] The substantial threat, however, need not be a threat to health, but only a threat of release—and the release need not actually occur.[75]

3. *Causation?*

The next element of comparison is causation, the third step in the classic tort analysis. Quite simply, none is required.[76] The chemical deposited need not be the same chemical that is threatening release.[77] Some commentators have described this as "very flexible causation,"[78] but that seems an understatement. As Judge Newcomer observed in *United States v. Wade*,[79] a leading case, "the release which results in the incurrence of response costs and liability need only be of 'a' hazardous substance and not necessarily one contained in the defendant's waste."[80]

4. *Damages: Response Costs*

Damages, the fourth step in the analysis, are somewhat unusual under CERCLA liability, because the plaintiff (usually the EPA) has the ability, from the defendant's perspective, to actually create a damage figure. The EPA does so in two steps: (1) it incurs costs after establishing that a response is necessary; and (2) it establishes the amount of cleanup required, thus determining the amount of response costs. Arguments arise as to when an impact has been remediated; this is the

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72. *See* CERCLA § 104(a), 42 U.S.C. § 9604(a) (1982 & Supp. V 1987).

73. *See* CERCLA § 101(22), 42 U.S.C. § 9601(22) (1982 & Supp. V 1987) (release includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment").

74. *See* 47 Fed. Reg. 31,180 (1982); 40 C.F.R. § 300.6 (1988) (explanation of EPA).

75. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989).

76. Rogers, *Three Years of Superfund*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10361, 10363 (Nov. 1983) ("Liability Without Causation: The Last Straw. . . . [N]o legal issue has so aroused the ire of lawyers representing potentially responsible parties.").

77. United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 999 (D.S.C. 1986), *aff'd in part, vacated in part sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989); United States v. Wade, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983).

78. S. BRIGGUM, *supra* note 58, at 99.

79. 577 F. Supp. 1326 (E.D. Pa. 1983).

80. *Id.* at 1333 (emphasis in original).

difficult "how clean is clean?" question.[81] The level of "clean" determines the cost of cleanup.[82]

CERCLA also gives the EPA authority to order cleanup by responsible parties under section 106. Failure to comply with the cleanup order subjects the party to treble damages.[83]

C. *Retroactivity*

The statute apparently was intended to be retroactive, and courts have held that CERCLA carries adequate indicia of Congressional intent[84] to override the presumption against retroactivity.[85] Nevertheless, commentators have argued that the retroactivity is so extensive as to be unconstitutional.[86] The Supreme Court, more than once, has de-

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81. Epley, *Federal and State Regulation of Activities Affecting Water Quality*, in THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS: REAL PROPERTY TRANSFERS AND MERGERS AND ACQUISITIONS (Practicing Law Institute Real Estate Law and Practice No. 286) 99, 146 (A. Nucciarone ch. 1986) [hereinafter IMPACT OF ENVIRONMENTAL REGULATIONS No. 286] ("There is no clear law . . . which establishes uniform specific numerical thresholds for various chemicals for the purpose of guiding cleanup of soil, surface water or groundwater in all cases."); *see* Sheridan, *How Clean is Clean: Standards for Remedial Actions at Hazardous Waste Sites Under CERCLA*, 6 STAN. ENVTL. L.J. 9 (1986-87).

82. *See* Mang, *A Review of Technical Approaches to a Cleanup*, INDUS. DEV., Mar./Apr. 1986, at 5.

83. CERCLA § 107(c)(3), 42 U.S.C. 9607(c)(3) (1982 & Supp. V 1987); *see* Solid State Circuits v. EPA, 812 F.2d 383, 388 (8th Cir. 1987). Congress established a cause of action allowing the EPA, in its discretion, to bring a claim in federal district court to recover up to three times the amount of any costs incurred by the Superfund from any person who is liable for a release or threatened release of a hazardous substance and who fails without sufficient cause to properly comply with the EPA's order. *Id.* at 388. With enactment of SARA, Congress altered the language slightly so that parties might avoid damages if they had sufficient cause to violate the order. *See* CERCLA § 106(b), 42 U.S.C. § 9606(b) (1982 & Supp. V 1987). In addition, SARA permits recipients of section 106 orders to petition for reimbursement from the Superfund. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A) (1982 & Supp. V 1987). The reimbursement option is not retroactive, however. *See* Wagner Seed Co. v. Bush, 709 F. Supp. 249, 252-53 (D.D.C. 1989).

84. Then Congressman David Stockman, in framing an argument against the enactment of CERCLA, provided a hypothetical situation in which a company could be held liable under the statute for 30-year-old contributions to a site. *See* 126 CONG. REC. 26,786 (1980). Obviously, Mr. Stockman's argument proved unpersuasive, manifesting congressional intent to enact such liability. As a consequence, parties find themselves in the predicted trap. For example, a North Dakota site (Lidgerwood) results from activities carried on in the 1930s to prevent grasshopper infestation. *See Site Work Continues*, SUPERFUND REP. (Inside Washington) 11 (June 10, 1987).

85. *See, e.g.*, Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1314 (N.D. Ohio 1983).

86. Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 BUS. LAW. 215 (1986).

clined review of the issue.[87]

Retroactivity means that "companies are now liable for damages resulting from waste management practices many years ago, regardless of whether any problems were foreseeable, the company acted in good faith, or state-of-the-art waste management practices were used."[88] Even though the EPA may choose to sue or force cleanup by the present owner of a site, past owners may be liable for contribution. The action in contribution may be based on an indemnification clause in the contract of sale,[89] but it need not be.

In *Sunnen Products Co. v. Chemtech Industries*[90] Judge Gunn found Chemtech Industries' sale of property to Sunnen was not subject to the defense of *caveat emptor*.[91] While the opinion did not abandon the need for the buyer to beware, it certainly carried the message to industry that the seller[92] need also be wary. In dicta, however, Judge Gunn noted that "[c]ourts have upheld agreements to transfer liability for potential toxic contamination from sellers to purchasers of property to defeat private claims under CERCLA."[93]

It is not too surprising that parties will be held liable for actions occurring prior to CERCLA's enactment but resulting in government response costs *after* its enactment. Consider, however, the case in which "costs of responding to conditions at a hazardous waste site . . . were incurred prior to the 1980 enactment."[94] The Eighth Circuit, when presented with such facts, ruled that retroactive application of CERCLA was proper.[95]

D. Joint and Several Liability

Perhaps the most encompassing element of CERCLA liability is

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87. *See Retroactivity Prevails*, Chem. Substances Control (BNA) No. 185, at 1 (Oct. 22, 1987); *No Review of CERCLA Retroactivity*, 18 Env't Rep. (BNA) 1502 (Oct. 9, 1987).

88. S. BRIGGUM, *supra* note 58, at 21.

89. *Appeals Court Rejects Lower Court Dismissal of Dispute over Indemnification for Cleanup*, 18 Env't Rep. (BNA) 681 (June 19, 1987) (discussing Marmon Group Inc. v. Rexnord Inc., 822 F.2d 31 (7th Cir. 1987)).

90. 658 F. Supp. 276 (E.D. Mo. 1987).

91. *Id.* at 278 n.3.

92. *Under Superfund, It's "Let the Seller Beware,"* CHEM. WK., June 17, 1987, at 46.

93. *Sunnen Prods.*, 658 F. Supp. at 278 n.3.

94. *Government Allowed to Sue Under CERCLA to Recover Pre-enactment Costs, Court Says*, 17 Env't Rep. (BNA) 1539 (Jan. 9, 1987).

95. *See* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 734-37 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

the imposition of joint and several liability.[96] Although the statute does not use the phrase "joint and several," courts uniformly have interpreted the statute to impose joint and several liability when the harm is indivisible.[97] Thus, the effects of CERCLA can be quite extensive.

For example, consider a situation in which waste materials from dental fillings containing silver are *sold* to a firm that recovers the silver.[98] The waste (mercury) from the silver recovery process is then deposited in local residential landfills. May the dentist be held liable? The EPA thinks so.[99] Certainly the fact that the material was sold rather than taken as waste presents no barrier to liability.[100]

1. Corporate Veil

CERCLA reaches directly through the corporate veil,[101] though not in the pure common law sense.[102] This enables the EPA simply to

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96. Brennan, *Joint and Several Liability for Generators Under Superfund: A Federal Formula for Cost Recovery*, 5 UCLA J. ENVTL. L. & POL'Y 101 (1986).

97. United States v. Monsanto Co., 858 F.2d 160, 170 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). The *Chem-Dyne* court extensively explored the legislative history of CERCLA. In particular, the court addressed the question of why the term "joint and several" was excised from the final version of the statute. The court determined that Congress wished the courts to apply common law precepts of joint and several liability, thereby making its imposition permissive rather than mandatory. The *Chem-Dyne* court concluded that unless a defendant could show the harm caused was clearly divisible, the imposition of joint and several liability was proper. *Id.*

The *Mansanto* court adopted *Chem-Dyne*'s analysis of CERCLA's legislative history. *See Monsanto*, 858 F.2d at 171 n.23. The court also noted that Congress tacitly approved of the *Chem-Dyne* approach when adopting the SARA contribution provisions. *Id.*

Hence, the rule today appears to be that among co-defendants, joint and several liability will be presumed. Each defendant will have the burden of proving their respective, divisible contribution to the harm. Otherwise, they will be unable to escape the imposition of joint and several liability.

98. The EPA has limited the reporting requirements for silver as a hazardous substance to an aggregate of pieces smaller than 100 micrometers weighing more than one pound. 40 C.F.R. § 302.4 (1989).

99. *See Where's the Novocaine?*, Chem. Substances Control (BNA) 1 (Nov. 5, 1987).

100. CERCLA § 107(a)(3) imposes liability on those who contract to dispose of hazardous wastes. 42 U.S.C. § 9607(a)(3). This provision could implicate a dentist who sells a waste product to a disposer of waste. *Cf.* New York v. General Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984). *But see* United States v. A & F Materials Co., 582 F. Supp. 842, 845 (S.D. Ill. 1984) (CERCLA does not impose liability for mere sale of a hazardous substance).

101. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982 & Supp. V 1987) For the text of section 107(a), see *supra* note 15.

102. Allen, *Refining the Scope of CERCLA's Corporate Veil-Piercing Remedy*, 6

ignore the corporate veil or, in the alternative, to recognize the veil and *pierce* it as provided for at common law.[103] The message to industry is simple: " 'the typical corporate shield against liability of the past is not good in a hazardous waste situation.' "[104]

The EPA will avoid the corporate veil to suit the following two principal needs: (1) to reach and impose a duty on corporate managers individually because of their power to control disposal of waste; and (2) to reach parent corporations because of their potentially greater ability to afford response costs.

a. Individuals

In *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO II)*[105] the federal district court for the western district of Missouri held the president of a bankrupt corporation individually liable as an owner and operator.[106] This result was somewhat surprising since the president did not directly oversee activities at the remote site from which the waste originated.

Although the Eighth Circuit reversed the district court's finding of liability, it did so on grounds unrelated to corporate veil-piercing, and at least one commentator feels that imposition of "a duty to monitor on corporate decision-makers may have been left intact."[107] New York seems to concur.[108]

Three cases decided subsequent to *NEPACCO II* have recognized a statutory basis for corporate officer liability.[109] In the first of these cases, *United States v. Carolawn*,[110] the federal district court in South Carolina denied a motion for judgment on the pleadings by two corporate officers.[111] Similarly, in *United States v. Mottolo*[112] the federal

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STAN. ENVTL. L.J. 43 n.6 (1986-87).

103. *See* Comment, *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA*, 1987 UTAH L. REV. 585, 599.

104. Ryon, *Toxic Waste Sites: Peril of Liability*, Los Angeles Times, Nov. 10, 1985, § VII (Real Estate), at 1, col. 1 (quoting Stephen Ramsey).

105. 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

106. *Id.* at 849.

107. Allen, *supra* note 102, at 70.

108. *See New York Sues Bankrupt Company Officials for $15 Million over Groundwater Contamination*, 17 Env't Rep. (BNA) 1425 (Dec. 19, 1986).

109. *See* Comment, *Dissolving the Corporate Veil: Corporate Officer Liability for Response Costs Under the Comprehensive Environmental Response Compensation and Liability Act*, 17 U. TOL. L. REV. 923, 951 (1986).

110. 14 Envtl. L. Rep. (Envtl. L. Inst.) 20699 (D.S.C. June 15, 1984).

111. *See id.* at 20700.

district court of New Hampshire denied a motion for summary judgment made by a corporate president, stating that individual liability arose under CERCLA section 107(a)(3).[113] Finally, the Second Circuit in *New York v. Shore Realty Co.*[114] held a corporate president liable as an operator under CERCLA section 107(a).[115]

Because of CERCLA's language permitting the EPA to ignore the corporate form, "[a]ll courts holding corporate officers individually liable have done so without piercing the corporate veil."[116] Even in cases in which a court seems convinced that the individual is more culpable than the corporation, courts have found both liable, rather than resort to common law piercing. For example, in *United States v. Leigh Industries*[117] the federal district court in Colorado fined the defendant corporation's president $10,000 while holding the corporation liable for only $1.[118] Individual liability, however, is not limited to corporate officers, since CERCLA permits it to be imposed on any employee.[119]

b. Parent Corporations

The situation with respect to parent corporations seems even more adhesive. The federal district court in Idaho applied the language from *NEPACCO II* to find a parent corporation liable for the disposal practices of its subsidiary.[120] This ruling makes acquisition of companies a potentially dangerous endeavor. Furthermore, some courts have even extended liability to corporations that have been dissolved.[121]

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112. 605 F. Supp. 898 (D.N.H. 1985).

113. *Id.* at 913-14.

114. 759 F.2d 1032 (2d Cir. 1985).

115. *See id.* at 1052.

116. Comment, *Corporate Officer Liability for Hazardous Waste Disposal: What Are the Consequences?*, 38 MERCER L. REV. 677, 686 (1987).

117. No. 87 CR 116 (D. Colo. Aug. 14, 1987).

118. *Company President Sentenced*, 18 Env't Rep. (BNA) 1265 (Aug. 28, 1987).

119. *See* United States v. Carr, 19 Envtl. L. Rep. (Envtl. L. Inst.) 21137 (2d Cir. July 25, 1989) (maintenance foreman held individually liable).

120. *See* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) (*Bunker Hill I*) ("Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up."); *see also* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988); Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988). *But see* Joslyn Mfg. Co. v. T. L. James & Co., 893 F.2d 80 (5th Cir. 1990).

121. *See, e.g.*, United States v. Sharon Steel Corp., 681 F. Supp. 1492 (D. Utah 1987) (choosing not to follow Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448 (9th Cir. 1987)).

2. *Insurers*

Insurance companies are not actually subject to CERCLA liability, but their policy holders are. Nonetheless, insurance companies feel the pressure of CERCLA liability because the extent of policy coverage may not be clear, especially for Comprehensive General Liability (CGL)[122] policies.[123] The insureds, companies the EPA has identified as Potentially Responsible Parties (PRPs), bring indemnification claims to their insurers[124] to cover the costs of cleanup.

Since many of these policies were written before CERCLA, and did not anticipate its absolute liability scheme, insurance companies often litigate coverage.[125] When the insurers lose, they are required to cover a risk they did not anticipate and for which they did not bargain.[126] Even if an insurance company wins its coverage suit, the extensive legal work required is quite costly.[127] Because the stakes are high,[128] no matter who prevails, the case generally will be appealed.

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122. For a brief pertinent history of CGL policies, see Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 14 (1986).

123. Discussion of insurer liability is somewhat abbreviated here since the topic is adequately addressed by another Article in this symposium issue. *See* Monts, *Insurance Coverage for Superfund Claims: Are Response Costs Responsible Damages?*, 41 S.C.L. REV. 871 (1990).

124. *See* Greenwald, *UTC Sues 240 Insurers for Pollution Cover*, BUS. INS., Feb. 1, 1988, at 27.

125. *See* Greenwald, *Superfund Unleashes Flurry of Coverage Suits*, BUS. INS., Feb. 1, 1988, at 1 (" 'It's become the national sport.' " (quoting Leslie Cheek, senior vice president, Crum & Foster, Inc.)).

126. Ashley, *Representation of the Insurer's Interests in an Environmental Damage Claim*, 54 DEF. COUNS. J. 11, 13 (1987) ("A review of the reported decisions involving insurance coverage for environmental damage claims may lead to a certain pessimism regarding the insurer's prospects for a successful coverage defense."). *But see* Greenwald, *supra* note 124, at 27 ("Policyholders have not fared well in several recent coverage decisions.").

127. *See generally* Kaplan, Balloun & Stigall, *Defense Strategies and Insurance Coverage Issues in a "Superfund" Case*, 53 INS. COUNS. J. 554 (1986).

128. Adler, *Appellate Court Denies Cover for Cleanup Costs*, BUS. INS., Mar. 7, 1988, at 1, 100. As an example of high stakes, the federal government purchased the town of Times Beach, Missouri for $33.7 million in 1983. Although liability litigation concerning the dioxin manufacturer, Northeastern Pharmaceutical and Chemical Co. (NEPACCO), continues, the EPA has spent an additional $155,172 in cleanup costs. Continental Insurance Company disputed NEPACCO's allegation that the CGL policy applies. *Id.*; *see also* Marcus, *The Price of Innocence: Landowner Liability Under CERCLA and SARA*, 6 TEMP. ENVTL. L. & TECH. J. 117, 117 n.6 (1986) ("The average cost of cleanup at a Superfund site during the years 1984-1985 was $12 to $13 million."). One commentator suggests that "under SARA that figure may triple to $36 million." McMahon, *supra* note 61, at 20.

3. *Successor Liability*

a. *Purchasers*

Perhaps the most compelling criticism of CERCLA liability is the assertion that it traps innocent purchasers.[129] Since courts have determined that CERCLA liability attaches to "those who own or operate a facility at the time the release occurs,"[130] an owner who purchased without notice of prior contamination may nevertheless be a potentially liable party. Under the joint and several liability scheme of CERCLA most "innocent landowners are considered just as culpable as the actual generators and disposers of the waste."[131]

When amending CERCLA in 1986, Congress addressed the innocent purchaser dilemma. The statutory changes enacted by Congress do not relieve the burden on innocent purchasers as much as they detail how the burden attaches to these parties.[132] The change that most significantly affects innocent purchasers involves the definition of "contractual relationship."[133] The Superfund Amendments and Reauthorization Act (SARA)[134] allows purchasers to avoid CERCLA liability if they purchase without knowledge of the land's condition, *and* they make "all appropriate inquiry into the previous ownership and uses of the property."[135] Thus, SARA creates a requirement of environmental "due diligence" in the purchase of property before relief from CERCLA liability is possible. Commentators have indicated that the activities necessary to manifest due diligence may be fairly extensive.[136] The EPA, however, has refused to set forth the thresholds of appropriate inquiry.[137]

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129. Moskowitz & Hoyt, *Enforcement of CERCLA Against Innocent Owners of Property*, 19 LOY. L.A.L. REV. 1171, 1172 (1986) ("[C]ourts have disregarded traditional notions of fairness in forcing those admittedly innocent of any polluting activities to pay for extravagant cleanup costs.").

130. S. BRIGGUM, *supra* note 58, at 216.

131. Marcus, *supra* note 128, at 120.

132. "Congress probably took away more than it gave." Gaba, *Lender Liability for Hazardous Waste Cleanup*, in LENDER LIABILITY LAW AND LITIGATION § 12.03[2][b][i] (J. Norton & M. Baggett eds. (Matthew Bender) 1989). For a review of the impact of SARA on landowner liability, see Marcus, *supra* note 128, at 129.

133. *See* CERCLA § 101(35), 42 U.S.C. § 9601(35) (1982 & Supp. V 1987).

134. Pub. L. No. 99-499, 100 Stat. 1678 (codified in scattered sections of 42 U.S.C.).

135. CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (1982 & Supp. V 1987).

136. *E.g.*, Anderson, *Will the Meek Even Want the Earth?*, 38 MERCER L. REV. 535, 566 (1987) ("investigation almost certainly must entail at least a physical inspection of the property").

137. *See* Leifer, *EPA's Innocent Landowner Policy: A Practical Approach to Liability Under Superfund*, 20 Env't Rep. (BNA) 646 (Aug. 4, 1989).

By placing the burden on the purchaser, Congress has prevented acceptance of activities like those of Donald LeoGrande which led to the decision in *New York v. Shore Realty Co.*[138] In that case LeoGrande, a condominium developer and president of Shore Realty, had the site audited prior to accepting a voidable purchase agreement. The audit disclosed information indicating substantial environmental problems. Nevertheless, LeoGrande opted not to void the purchase agreement, but simply sought a waiver of liability on the grounds that Shore Realty did not contribute to the problems at the site.[139] The court held Shore liable as an owner.[140] Notably, SARA's innocent purchaser defense would not have affected this holding, since LeoGrande knew of the land's condition.

b. Corporate Merger/Acquisition

While prudence may be an obvious requirement in the outright purchase of industrial property, it may be overlooked in corporate mergers or acquisitions. Because a firm acquires environmental liabilities in most, if not all, acquisitions, "environmental risk is a vital factor in corporate acquisitions."[141] Some commentators feel liability *may* be avoided "[b]y purchasing a company's assets rather than its stock."[142] Others see liability attaching "regardless of whether the acquisition of the property was through a stock transfer or a purchase of assets."[143] Given CERCLA's focus on ownership regardless of culpability, the latter view seems more likely. The result, however, ultimately may be determined by state corporation law.[144]

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138. 759 F.2d 1032 (2d Cir. 1985) For a thorough analysis of the landmark *Shore I* decision, see Note, *New York v. Shore Realty*, 27 NAT. RESOURCES J. 409 (1987).

139. *See Shore Realty*, 759 F.2d at 1039.

140. *Id.* at 1044.

141. Varnum & Achterman, *Toxic Waste Liability a Risk in Acquisitions*, NAT'L L.J., Oct. 28, 1985, at 15.

142. *Buy Assets, Not Liabilities*, Chem. Substances Control (BNA) 4 (Feb. 12, 1987). *But see* Spracker, *Corporate and Liability Consequences of Acquiring Environmentally Sensitive Properties* in BURDENS OF ENVIRONMENTAL REGULATION, *supra* note 45, at 16 ("In a case now in litigation, United States v. Chemical and Pigment Co,. the United States is for the first time attempting to establish a federal rule imposing liability for CERCLA cleanup costs on successor corporations (those that acquire the assets of another).").

143. Alden, Gloistein & Kroesche, *Overview of General Laws that Govern Business Decisions*, in IMPACT OF ENVIRONMENTAL REGULATIONS No. 286, *supra* note 81, at 261.

144. *See* Shea, *supra* note 66, at 13 (citing Philadelphia Elec. Co. v. Hercules Inc., 762 F.2d 303 (3rd Cir.), *cert. denied*, 474 U.S. 980 (1985)).

c. *Foreclosure*

In *United States v. Mirabile*[145] Judge Newcomer squarely addressed the issue of a foreclosing lender's liability. In that case two banks and the Small Business Administration (SBA) foreclosed on the Turco site in Phoenixville, Pennsylvania.[146] The court granted summary judgment to one of the banks and to the SBA on the grounds that they did not fall within the statutory definition of either an owner or operator.[147]

The remaining defendant, American Bank and Trust Company (ABT), argued that its purchase of the site vested ABT only with equitable title. The court did not reach the equitable title argument, however, because it determined that ABT's actions fell within an exemption to ownership. That exemption permitted the holding of an "indicia of ownership primarily to protect [a lender's] security interest"[148] without being defined as an owner.[149]

In *United States v. Maryland Bank & Trust Co.*[150] the federal district court in Maryland reached the opposite conclusion under similar facts. While the *Maryland Bank* court noted distinguishing characteristics,[151] it openly disagreed with a broad reading of *Mirabile* on the issue of the foreclosure exemption.[152] The *Mirabile/Maryland Bank* controversy has become moot now, however, since CERCLA, as amended by SARA, currently requires banks to meet the innocent purchaser requirements to escape liability.[153]

Nevertheless, *Mirabile* enjoys continued significance in two ways, both of which involve the court's holdings concerning another bank, Mellon. First, Mellon became involved in the case entirely through its acquisition of yet another bank, Girard. Girard was the party which had actually dealt with the Turco site. The fact that the transfer of bank assets also meant a transfer of CERCLA liability understandably

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145. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. Sept. 4, 1985).

146. *Id.* at 20995.

147. *Id.* at 20996-97.

148. *Id.* at 20995.

149. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1982 & Supp. V 1987).

150. 632 F. Supp. 573 (D. Md. 1986).

151. For example, ABT held the at-issue property for only 4 months, while Maryland Bank and Trust held the at-issue property for 4 years. *Id.* at 580.

152. *Id.*

153. Meeting the innocent purchaser requirements, however, is no simple feat: "[A]lmost *no one* can qualify as an 'innocent landowner' or an 'innocent lender,' unless and until they have gone through a complete environmental audit or assessment with respect to their property or their loan security." Schwenke, *An Overview of Issues of Landowner and Lender Liability* in BURDENS OF ENVIRONMENTAL REGULATION, *supra* note 45, at 13, 14.

has the FDIC and FSLIC concerned.[154] Because of the increasing number of failing financial institutions, both of these agencies acquire bank assets routinely—but neither wants the heavy extra baggage of CERCLA liability. In addition, lenders often resell loans in the federally-operated secondary mortgage market. These loan-purchase agreements contain environmental due diligence requirements. If the requirements are not met, then the original lenders may have to repurchase the loans secured by contaminated real estate.[155]

Second, the court in *Mirabile* declined to grant summary judgment to Mellon because the facts concerning the level of Girard's involvement in Turco's day-to-day operations were in dispute.[156] An impermissible level of involvement would make the bank liable as an operator of the site.[157] In *United States v. Fleet Factors Corp.*[158] Judge Kravitch indicated that day-to-day management by a lender is not required for the lender to incur liability. The court held "a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[159]

Disallowance of bank involvement, however, arguably results in the bank being unable to assure itself that its borrower can operate effectively enough to repay its debt. Ironically, if the bank attempts to avoid liability by not becoming involved in the borrower's business operations, the bank increases the risk that foreclosure will be necessary, and thus runs the risk that it will become subject to liability based on foreclosure. The message lenders receive is simple:[160] acquisition

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154. *See FDIC, FSLIC Face Liability for Cleaning Up Contaminated Properties Held by Failed Banks*, 18 Env't Rep. (BNA) 1952 (Dec. 25, 1987).

155. *Environmental Cleanup Liability Could Affect Mortgages, Lawyer Says*, 19 Env't Rep. (BNA) 14 (May 6, 1988). (Loans which fail to meet Federal Home Loan Mortgage Corporation or Federal National Mortgage Association standards must be repurchased.). A copy of the Environmental Due Diligence Requirements of the Federal National Mortgage Association is available in chapter 13, Appendix A of Gaba, *supra* note 132.

156. *Mirabile*, 15 Envtl. L. Rep. at 20997.

157. For a list of activities which may move a lender toward operator status, see Gaba, *supra* note 132, § 13.02[1][c].

158. 901 F.2d 1550 (11th Cir. 1990).

159. *Id.* at 1557 (footnote omitted).

160. *See* Breindel, *The Hazards of Hazardous Waste*, A.B.A. BANKING J., Oct. 1987, at 169; Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability, and Tox-Waste Cleanup*, 50 LAW & CONTEMP. PROBS. 119 (1987); Fleischaker & Mitchell, *The Insecurities of Security Interests in Hazardous-Waste Cases*, NAT'L L. J., Sept. 15, 1986, at 18; *Bank That Forecloses Liable for Waste Cleanup*, LEGAL TIMES, Apr. 28, 1986, at 6.

through foreclosure is ownership, which is liability, and too much involvement, whether or not it constitutes operation, is still liability.

4. Governments

Although states are presumptively immune from suit in federal court under the eleventh amendment, "[f]iling suit as a plaintiff constitutes a waiver of eleventh amendment immunity as well as sovereign immunity."[161] Prior to the SARA amendments, a significant dispute had developed concerning whether Congress had intended to abrogate the eleventh amendment's protection of states in federal court.[162]

On remand from the Supreme Court, the Third Circuit determined that SARA clearly stated congressional intent to abrogate eleventh amendment immunity.[163] The issue, however, still was not resolved completely. Judge Elfvin, in *United States v. Freeman*,[164] questioned congressional authority to unilaterally abrogate eleventh amendment immunity.[165] The Supreme Court finally resolved the issue by reasoning that the Congress has the power under the commerce clause to subject states to suits for damages.[166]

Even if eleventh amendment immunity is abrogated or waived, SARA amended CERCLA to exclude from the definition of owner any properties involuntarily acquired by a state or municipality.[167] The exclusion is lost, however, if the state or local government contributed hazardous substances to the site.[168] Thus, cities may find themselves liable if they deposit or have deposited hazardous substances at a site.[169]

E. Other Considerations

1. Statutes of Limitations

CERCLA provides for an express three-year limitations period.[170]

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161. United States v. Mottolo, 605 F. Supp. 898, 910 (D.N.H. 1985).

162. *See* United States v. Union Gas Co., 792 F.2d 372 (3d Cir. 1986) (*Union Gas I*), *vacated*, 479 U.S. 1025 (1987).

163. United States v. Union Gas Co., 832 F.2d 1343 (3d Cir. 1987) (*Union Gas II*), *aff'd and remanded sub nom.* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).

164. 680 F. Supp. 73 (W.D.N.Y. 1988).

165. *Id.* at 77.

166. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).

167. *See* CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D) (1982 & Supp. V 1987).

168. *Id.*

169. *See Court Rules Scranton, Pa., Liable at Site*, 18 Env't Rep. (BNA) 1744 (Nov. 13, 1987) (citing United States v. Scranton, Pa., No. 86-1591 (M.D. Pa. Sept. 25, 1987)).

170. CERCLA § 112(d), 42 U.S.C. § 9612(d) (1982 & Supp. V 1987).

But in *United States v. Mottolo*,[171] Chief Judge Devine ruled that "Congress created a silent exception to CERCLA's three-year statute of limitations by omitting any reference to judicial actions for cost reimbursement in section 112(d), 42 U.S.C. § 9612(d)."[172] The court thus determined that the three-year limitations period applied only to claims against the Hazardous Substance Response Fund and judicial actions for natural resource damage.[173]

In *United States v. Bliss* (*Bliss II*)[174] Judge Nangle indicated that the defendants simply had failed to carry their burden of demonstrating the applicability of any statute of limitations. Accordingly, he "summarily" denied their motion to dismiss the action.[175] In doing so, Judge Nangle used language so terse that one might conclude that he viewed the motion as bordering on frivolous.[176] No court since has applied any statute of limitations to CERCLA judicial actions for cost reimbursement.

2. *Service of Process*

Prior to the enactment of SARA, courts had held that CERCLA authorized nationwide service of process.[177] In *United States v. Bliss* (*Bliss I*),[178] for example, Judge Nangle found that CERCLA section 106 "implies nationwide service of process."[179] This holding brought defendant Syntex, the parent corporation of a Missouri corporation, under the jurisdiction of the federal district court in Missouri, where the disposal of the hazardous substances (Dioxin and Trichlorophenal (TCP)) had occurred. Despite this and similar holdings permitting nationwide service of process, the EPA requested and received from Congress an explicit grant of nationwide service to reduce litigation difficulties.[180]

When nationwide service of process is considered in light of: the inclusiveness of the term "hazardous substance"; the loose require-

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171. 605 F. Supp. 898 (D.N.H. 1985).

172. *Id.* at 903.

173. *Id.*

174. 17 Envtl. L. Rep. (Envtl. L. Inst.) 21217 (E.D. Mo. June 15, 1987).

175. *Id.*

176. Perhaps Judge Nangle's impatience can be explained by the fact that the defendant, Bliss, represented himself pro se and clearly failed to plead his motion correctly.

177. *See* United States v. Bliss, 108 F.R.D. 127, 135 (E.D. Mo. 1985) (*Bliss I*).

178. 108 F.R.D. 127 (E.D. Mo. 1985).

179. *Id.* at 135.

180. *See* CERCLA § 113(e), 42 U.S.C. § 9613(e) (1982 & Supp. V 1987); *see also* Note, *Nationwide Service of Process Under the Comprehensive Environmental Response, Compensation, and Liability Act: The Need for Effective Fairness Constraints*, 73 VA. L. REV. 631, 632 (1987).

ments for breach of duty and causation; the application and retroactive application of absolute strict liability; and an expansive joint and several liability scheme, then the truly pervasive and all-encompassing nature of CERCLA liability is apparent.

III. Coping with CERCLA Liability

Having discussed the tremendous burden CERCLA liability places upon the various actors in the industrial property use and acquisition system, the focus of the Article now turns to the reaction of these parties to that burden.

A. Generators

Unquestionably CERCLA has been at least somewhat effective at producing its desired results of cleaning up and preventing hazardous waste contamination. This section of the Article suggests actions generators can take to prevent or reduce the probability of CERCLA liability, as opposed to the ways to reduce retroactive cleanup costs.

1. Reductions in Use

On the prevention side, one of CERCLA's key effects has been the minimization of hazardous waste production. For example, the Chemical Manufacturer's Association (CMA) reports that hazardous waste generation by the chemical industry in this nation declined 21.8% during the period 1981-85.[181] Of course, "a major problem in evaluating waste reduction trends is deciding exactly how it should be measured."[182] Nonetheless, these results and others indicate substantial progress in the minimization of hazardous waste production, and demonstrate that CERCLA does have significant positive impact.[183]

The question remains, however, whether that impact is enough. Commentators charge that hazardous waste management practices remain disposal-oriented and "have failed to protect society adequately

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181. *Chemical Industry Cuts Hazardous Waste by More Than 20 Percent CMA Study Says*, 18 Env't Rep. (BNA) 571 (June 12, 1987).

182. Paige, *Editorial*, Focus (Newsletter of the North Carolina Solid and Hazardous Waste Management Branch) 1 (Fall 1987).

183. *See, e.g.*, Narus, *Hazardous Wastes: Controlling Sources*, N.Y. Times, Nov. 9, 1986, § 11 (New Jersey Weekly), at 1, col. 1 (Du Pont plant in Salem County, New Jersey reduced its acid waste by 22% and organic chemical waste by 11% in the prior two years); *Chemical Firms Said Moving to Reduce Risk in General Absence of Pollution Insurance*, 17 Env't Rep. (BNA) 781 (Sept. 26, 1986); Rich, *Waste Reduction is the Way to Go*, Chem. Wk., Aug. 20, 1986, at 39.

from the very substantial costs of hazardous waste production."[184] It generally is accepted that "the ultimate waste management technique [is] source reduction."[185] The rational conclusion to be drawn from these competing viewpoints implies that CERCLA liability is working, but perhaps not precisely enough.

2. *Control*

Hazardous waste generators currently enjoy an increased level of control over the disposition of their wastes. This increased control manifests itself in four stages: transportation; method of disposal; auditing; and self-handling.

a. Transporters

At the transportation stage, generators have simply become suspicious of their transporters. Prior to CERCLA, generators often viewed waste collection as the end of their responsibility for the waste. Today, generators know this is not the case. Even if the waste is purchased for reuse[186] or is transported to an unauthorized site—different from that designated[187]—the generator may be held liable.

In addition to the liability imposed on the shipper,[188] concern is growing about the level of transporter quality. The Department of Transportation's enforcement of the Hazardous Materials Transportation Act (HMTA)[189] also has been the target of criticism.[190] Accord-

184. Note, *Legal Incentives for Reduction, Reuse, and Recycling: A New Approach to Hazardous Waste Management*, 95 YALE L.J. 810 (1986).

185. Narus, *supra* note 183, at 1, col. 1.

186. *See* United States v. Ward, 618 F. Supp. 884, 893-94 (E.D.N.C. 1985) ("Liability under CERCLA cannot be avoided by the mere characterization of a transaction as a sale."); New York v. General Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984); United States v. A&F Materials Co., 582 F. Supp. 842, 848 (S.D. Ill. 1984). *But cf.* Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257 (D.N.J. 1987) (court reluctantly reached conclusion that sale of contaminated property followed by buyer's fortuitous movement of waste to another location as fill material did not subject property seller to liability at new location).

187. *See, e.g.*, United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985) ("A generator is not absolved from liability under CERCLA simply because it did not select the disposal site, [or] because ownership of waste was transferred to a transporter.").

188. The "shipper" is the party who consigns the material to be shipped, as opposed to the transporter or carrier who physically transports the material.

189. 49 U.S.C. §§ 1801-1813 (1982 & Supp. V 1987).

190. *See* Rich, Bluestone, Ichniowski & Bradford, *Regulations*, CHEM. WK., Aug. 20, 1986, at 49, 52 (attributing to Office of Technology Assessment).

ingly, cautious selection of transporters has become more common.[191]

b. *Destruction*

One of the few requirements for liability under CERCLA is the threat of release of a hazardous substance.[192] Of course, destruction of a hazardous substance prevents its release. Thus destruction represents the ultimate form of control.[193] Therefore, generators of hazardous substances often seek to destroy their wastes as opposed to placing them in landfills. "[L]andfills inhibit releases through containment but will eventually (and usually gradually) leak and may contaminate groundwater."[194] Landfills give new meaning to the phrase "[t]here is always a way to water."[195]

Burying hazardous substances in landfills is appealing to industry because of the relatively low cost as a means of disposal. The initial cost of landfilling, however, does not reflect the true final cost after CERCLA liability.[196] Thus, sometimes apparent cost efficiency coaxes generators into a disposal method that fails to reduce their liability exposure.[197] As liability information becomes better disseminated, however, the destruction option becomes more desirable and generators are realizing that "it's prudent to incinerate when possible."[198]

c. *Auditing*

The environmental audit is perhaps the most significant environ-

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191. *See generally* Rosenberg, *Coping with Hazardous Waste Disposal*, EDITOR & PUBLISHER, Dec. 5, 1987, at 46.

192. *See* CERCLA § 104(a), 42 U.S.C. § 9604(a) (1982 & Supp. V 1987).

193. F. HERBERT, DUNE 422 (Berkley ed. 1977) ("The people who can destroy a thing, they control it."). *Dune*, while transformed into a movie of dubious quality, was an award-winning book, and certainly a classic in its genre. The book, written in 1965, was a science fiction story set many millennia in the future, but it closely analogized and predicted the political and natural resources/environmental collision that occurred in the 1970s. In many ways its predictions concerning the conflicts over resources and the importance of environmental awareness in politics have proven as prescient as Rachel Carson's *Silent Spring*.

194. OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL 14 n.2 (1983).

195. F. HERBERT, *supra* note 193, at 214.

196. *See* Rosenberg, *supra* note 191, at 46 ("bargain prices may only 'be a down payment' on future financial liability for another's mismanagement" (quoting Ernest King, ANPA industrial hygienist)).

197. Address by Senator Phil Leventis, University of South Carolina Environmental Law Society (Feb. 13, 1988).

198. Rosenberg, *supra* note 191, at 52 (quoting Donald Anglehart, attorney with Gadsby and Hannah, Boston).

mental change industry has instituted. It has become the mainstay of liability reduction. Initially, auditing met with resistance because "environmental audit studies entail risks that corporate executives may be reluctant to undertake."[199] Eventually, however, the rationale prevailed that "even dangerous facts are valuable if you've been trained to deal with them."[200] Environmental audits initially developed with a self-assessment focus in response to Securities and Exchange Commission (SEC) requirements issued in 1971.[201] But with the advent of CERCLA liability, the audit report became "a valuable risk assessment document."[202] Guidance documents explaining how to perform environmental audits[203] and consultants willing to do so[204] have become common since CERCLA's enactment. While performance of self-assessments[205] may be propelled by all environmental statutes in combination, CERCLA alone propels auditing of disposal contractors.[206]

When an environmental audit is performed, it is important that the auditor not overlook the financial stability of the contractor as a factor. " '[M]ost disposal companies are involved in a corporate shell game' "[207] that can make financial assessment difficult. Thus, it is important "to look into the company's financial health."[208]

d. Self-Handling

While self-handling of waste materials would seem to afford companies the greatest opportunity for control, it is not only a capital intensive endeavor, but also requires acquisition of a RCRA part B per-

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199. Myers & McCaffery, *The Goals and Techniques of Environmental Audits*, 30 PRAC. LAW. 41, 52 (Jan. 15, 1984); *see* Hogan & Bromberg, *The Hidden Hazards of the Environmental Audit*, 36 PRAC. LAW. 15 (April 1990).

200. F. HERBERT, *supra* note 193, at 43.

201. Securities Act Release No. 33-5170, 36 Fed. Reg. 13,989 (1971).

202. Myers & McCaffery, *supra* note 199, at 52.

203. *See e.g.*, EDISON ELECTRIC INSTITUTE, ARTHUR D. LITTLE, INC., ENVIRONMENTAL AUDITING WORKBOOK (1983).

204. *See, e.g., Three Steps to Compliance,* Chem. Substances Control (BNA) 1 (Sept. 24, 1987).

205. Friedman & Gianotti, *How to Perform an Environmental Self Assessment*, 3 PRAC. REAL EST. LAW. 53 (Nov. 1987); Little, *Environmental Self Assessments*, 7 E. MIN. L. INST. 2.1 (1986).

206. For good background analysis of liability for the eight major hazardous waste disposal companies, see COUNCIL ON ECONOMIC PRIORITIES, HAZARDOUS WASTE MANAGEMENT—REDUCING THE RISK (1986). *But cf.* Rich, *Eight Companies on the Fast Track*, CHEM. WK., Aug. 20, 1986, at 28.

207. Rosenberg, *supra* note 191, at 48 (quoting Donald Anglehart, attorney with Gadsby and Hannah, Boston).

208. *Id.* at 46 (citing Ernest King, ANPA industrial hygenist).

mit.[209] In theory, the part B permit should be available for any company making the requisite application. As a practical matter, the EPA permitting process is just beginning to move at a pace that would make this a viable alternative.[210]

B. Owners

The owner of a contaminated piece of property has three options under CERCLA: two are bad; one is illegal. Under the first option, the owner can spend substantial sums of money to clean up the site. The owner then can spend more money to sue previous owners[211] or other PRPs[212] for contribution. The owner must comply with the National Contingency Plan (NCP) if contribution is sought. Among other things, the NCP requires an opportunity for public hearing.[213]

The second option also requires the owner to spend significant amounts of money on cleanup and legal costs, but the defendant is the owner's insurance company.[214] If the owner loses, he basically is restricted to option one.

The final option would be for the owner to misrepresent the status of the property to an innocent purchaser, with substantially deeper pockets, hoping that subsequent cleanup actions would be directed against subsequent purchasers. CERCLA's criminal enforcement provisions[215] are not well developed and, thus, the owner may escape prosecution initially. Eventually, though, this option will lead to disasterous results and the owner will go to jail.[216]

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209. *See* CERCLA § 125, 42 U.S.C. § 6925 (1982 & Supp. V 1987).

210. Rich, Bluestone, Ichniowski & Bradford, *supra* note 190, at 51 (of 2,909 applications since 1980, only 421 have been issued).

211. For an analysis of landowner suits, see Comment, *Successor Landowner Suits for Recovery of Hazardous Waste Cleanup Costs: CERCLA Section 107(a)(4)*, 33 UCLA L. REV. 1737 (1986).

212. Haggerty, *Environmental RM: "Bad News Game"*, NAT'L UNDERWRITER, July 4, 1986, at 4, 14 ("Eighty percent of the people who put substances in those landfills are out of business." (citing Paul Fahrenthold, vice president, Extrix)).

213. *See* Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1574-82 (E.D. Pa. 1988). *But see* General Elec. Co. v. Litton Bus. Sys., 715 F. Supp. 949 (W.D. Mo. 1989) (state agency input may substitute for public comment).

214. For a thorough analysis of causes of action against property insurers and their defenses, see MALLIN, POLLUTION AND CONTAMINATION: HOW WILL PROPERTY INSURER'S RESPOND? (1987).

215. CERCLA § 103(b)(3), (d)(2), 42 U.S.C. § 9603(b)(3), (d)(2) (1982 & Supp. V 1987) (authorizing imposition of both fines and jail terms).

216. Hofman, *Keep Up With Environmental Law: Expert*, BUS. INS., Nov. 16, 1987, at 103 ("Federal authorities have begun slapping violators with criminal penalties, including jail terms.").

C. *Purchasers*

CERCLA and its state related progeny unquestionably have had a substantial impact on the alienability of industrial property.[217] A 1986 survey revealed that "environmental regulations regarding the disposal of toxic wastes and the reuse, transfer and sale of industrial sites was the *foremost* concern of corporate facility planners."[218]

Joint liability, as a practical matter, often leads to the result that "the party responsible for the cleanup is usually the corporation with the deepest pockets—the one with the most money."[219] In order to dilute his own liability, all an owner with a "turkey piece of property"[220] really has to find is a buyer with deeper pockets.

While a seller is by no means absolved of responsibility, the buyer, unlike the United States Attorney General, cannot compel the seller to clean the property. Rather the buyer must clean it first and then risk proving an action for damages.[221]

CERCLA liability has a way of creating desperation—and "desperate people are the most dangerous."[222] The buyer who believes the days of *caveat emptor* have past will be rudely awakened. The viable, albeit illegal, option for the owner who desires to avoid cleanup costs will be to misrepresent the condition of the land, or withhold relevant information. The unwary buyer will find that innocence combined with ignorance will subject the otherwise faultless purchaser to CERCLA liability.[223]

Almost as dangerous as the fraudulent seller is the seller who has a policy of letting "sleeping dogs lie."[224] The seller may *think* that by remaining ignorant about the status of the property he can argue a lack of culpability, but of course this argument does not diminish CERCLA liability.

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217. *See* Buckley, *The Impact of Environmental Liability on Land Use Planning*, 15 CAROLINA PLANNING 49 (Fall 1989).

218. *The Impact of Environmental Considerations on Industrial Real Estate Transactions*, INDUS. DEV., Mar./Apr. 1986, at 1 (emphasis in original).

219. Baker, *Contemporary Issues in Real Estate Transactions Involving Environmental Concerns*, INDUS. DEV., Mar./Apr. 1986, at 2.

220. *Id.* at 3.

221. Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp., 15 Envtl. L. Rep. (Envtl. L. Inst.) 20103 (E.D. Tenn. Aug. 16, 1984).

222. F. HERBERT, *supra* note 193, at 450.

223. *See* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

224. Stokes, *Legal Aspects of Real Estate Transactions Involving Environmental Concerns*, INDUS. DEV., Sept./Oct. 1986, at 10.

1. *Pre-Purchase Audit*

The observation that "the unknown brings its own worries"[225] fairly summarizes the reasoning behind a pre-purchase audit. The purpose of this type of audit centers on gathering information about the property to be sold so that the parties involved, particularly the buyer, know what is being transferred. The necessity of an environmental inspection prior to purchase of industrial property has been likened to the termite inspection for home sales.[226] The failure to inspect may result in "the ultimate nightmare for any company buying a piece of land."[227] Therefore, pre-purchase audits are widely recommended.[228]

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225. F. HERBERT, *supra* note 193, at 387.

226. Paul, *Environmental Exams Become Common*, Wall St. J., Oct. 13, 1987, at 6, col. 1.

227. Sheeran, *Property Buyers Inspect Land for Toxic Waste*, INC., Feb. 1986, at 97 (company which purchased property for $48,000 estimated cleanup bill at $2 million.).

228. *See* Paul, *supra* note 226, at 6, col. 1 (" 'You have to be an idiot not to look at the [environmental] risks before buying a piece of property.' " (quoting Steven Tasher, co-author of a handbook on environmental laws)); Payne, *Pre-acquisition Site Audits and Waste Cleanup*, INDUS. DEV., Sept./Oct. 1986, at 15 ("An environmental audit is an indispensable part of property acquisition.").

One commentator recommends consideration of at least nine items when acquiring property:

(1) disposal areas in and about the property;

(2) existing information concerning soil and groundwater;

(3) location of any underground storage tanks and lines;

(4) history of spillage or leakage;

(5) in-plant drainage systems and disposal facilities;

(6) historical information concerning disposal, loading and unloading areas, old tankage, and information about conditions at the time of abandonment;

(7) location, use, and remaining contents of lagoons, impoundments, etc.;

(8) investigation for asbestos, PCB use (transformers, capacitors, etc.), or ureaformaldehyde insulation; and

(9) examination of land for Radon.

Rodberg, *General Environmental Law Considerations Affecting Business Transactions*, in IMPACT OF ENVIRONMENTAL REGULATIONS No. 286, *supra* note 81, at 52-53.

Note that that Radon, the substance cited in item 9 above, is directly addressed in the Toxic Substance Control Act, 15 U.S.C. §§ 2661-2671 (1988), and the "EPA is not authorized . . . to provide for a removal or remedial action under CERCLA in response to a release or threatened release of a naturally occurring substance." Gaba, *supra* note 132, § 13.02[1][b]. If, however, the source of Radon is augmented by nonnatural occurrences, CERCLA liability may lie. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989). Regardless, Radon presents an interesting example of the pace with which environmental concerns with property have grown since CERCLA's enactment. Consider the following excerpts, in chronological order. *Can You Make a House Too Tight?*, CONSUMER REP., Oct. 1981, at 582 (While recognizing Radon as a potential threat, Consumer's Union concluded "it would be extremely difficult to tighten most existing houses enough to create an indoor air problem."); *Indoor Air Pollution*, CONSUMER REP., Oct. 1985, at 600, 601 ("Increasing evidence suggests that the second leading cause of lung

Of course, auditing a site costs money, but failing to audit an existing industrial facility can cost a great deal more.[229] As a result, CERCLA has created a virtual requirement for environmental auditing, which is a significant additional burden on the purchaser of industrial property. Adding further cost to the risk reduction, it is imperative that both parties consider the confidentiality of the audit results. The only way to ensure reasonable confidentiality is to invoke the attorney-client privilege, which obviously adds to the expense.[230] Moreover, the attorney who engages an environmental consultant to perform an audit for a client must be sure that the consultant is competent.[231]

Finally, purchasers through corporate acquisition or merger should be just as careful as those who simply purchase real property.[232]

2. *Contract Provisions*

One way to *limit* the expense and hassle of environmental audits is to include a remedies provision in the purchase contract. In fact,

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cancer may well be exposure to radon gas."); *Radon Detectors*, CONSUMER REP., July 1987, at 440, 443 ("CU strongly urges that *all* homes be screened for radon. (A radon test would also be a wise requirement to write into a home-buying contract, along with a clause requiring the seller to fix any problems.)" (emphasis in original)); Kornreich, *Dealing with the Invisible Trap of Radon Liability*, PRAC. REAL EST. LAW., Sept. 1987, at 17, 18 ("Lawyers have only begun to glimpse the radon-related liability problems likely to arise as awareness and fear spread to the general public."); Hebert, *Dangerous Levels of Radon Widespread*, Washington Post, Oct. 19, 1989, at A28, col. 1.

In addition to the nine items listed above, another commentator suggests consideration of the following factors when acquiring property:

(1) legal chain of ownership and control (including chain of leases);

(2) employee complaints; and

(3) neighbors/local citizens' groups.

Miller, *The Components of a Facility Review*, INDUS. DEV., Mar./Apr. 1986, at 4.

229. Payne, *supra* note 228, at 17. A parcel with 12 buildings on it was sold for about $2.5 million. Engineering studies several years later indicate the buyer also purchased $6 million to $10 million in chemical cleanup costs: no bargain at half the price. *Id.*

230. For a consideration of factors to consider in maintaining attorney-client confidentiality in this context, see Witmer, *Environmental Audits in Connection with Property Purchases and Sales*, in IMPACT OF ENVIRONMENTAL REGULATIONS NO. 286, *supra* note 81, at 292.

231. An attorney should consider an environmental consultant's reputation, but professional registration (Professional Engineer, for example) and substantial malpractice insurance are equally important. CERCLA is not simply a boon for attorneys, it has attracted many environmental "specialists," some of dubious quality. A prudent attorney will work hard to protect the client from receiving poor advice.

232. *See generally*, Koczan, *Environmental Audits and Their Application to Real Property Transfers, Acquisitions and Divestitures*, in IMPACT OF ENVIRONMENTAL REGULATIONS NO. 286, *supra* note 81, at 271; *see also Information Should be Gathered*, 17 Env't Rep. (BNA) 792 (Sept. 26, 1986).

whether or not an audit is performed, protective provisions in the purchase contract always should be considered. Both audits and remedies provisions have become integral parts of industrial real estate purchases. The buyer can protect himself from the risk of unquantifiable CERCLA liability in three ways: (1) by including a provision coupling a pre-purchase audit with termination rights; (2) by having the seller make specific representations, warranties and indemnities in the contract; or (3) by having the seller agree to perform necessary remedial work.[233]

While this may seem relatively simple, "environmental provisions have become one of the most hotly contested issues in real estate negotiations."[234] Not surprisingly, the more likely that the provisions will be utilized, the more time and effort the parties will spend scrutinizing them. Since existing industrial sites involve numerous environmental risks, environmental provisions in contracts concerning these sites are the ones most likely to be needed—and thus, most difficult to acquire and, even if acquired, most likely to be litigated.

The details of these provisions can have tremendous impact on the allocation of risk. Therefore, contractual clarity is vital. To reduce the possibility of misinterpretation, commentators have developed standard contract forms.[235] Clearly, CERCLA has created a reaction in purchasers that manifests itself in additional and expensive contractual gyrations.

3. Foreign Industrial Sites

For some companies a viable option to CERCLA liability is to locate industrial facilities outside the United States. The advantage of this option is that South America, Central America, and Canada have less restrictive environmental laws.[236] Some commentators have linked CERCLA liability to the migration of companies out of the United States.[237]

Canada is especially attractive to some industrial decision makers, because it is socio-economically comparable to the United States, and some portions of Ontario are actually more centrally located to north-

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233. Chesler, *Negotiating the Environmental Issues in Real Estate Contracts*, INDUS. DEV., May/June 1987, at 19, 26.

234. *Id.* at 19.

235. *See* Chesler, *Environmental Provisions in Real Estate Contracts*, in IMPACT OF ENVIRONMENTAL REGULATIONS No. 286, *supra* note 81, at 311, 333-49.

236. P. SHRIVASTAVA, BHOPAL: ANATOMY OF A CRISIS (1987).

237. *Industry Shut Out of Superfund Agreement Attorney Says; Corporate Risks Discussed*, 17 Env't Rep. (BNA) 780 (Sept. 26, 1986) (citing an address by George Freeman, lawyer with Hunton & Williams, Richmond, Va.).

eastern population centers. Canada's moderate environmental regulations have not imposed liability on the scale that CERCLA has, but companies should be wary that it someday might, and purchase with appropriate caution.[238]

4. *Virgin Property*

Just as CERCLA liability can induce companies to locate facilities outside the United States, it also can induce them to prefer undeveloped property within the United States. The benefits of purchasing undeveloped property as opposed to existing industrial property are obvious. The comparison will be discussed in further detail in a later section of this Article,[239] but suffice it to say at this juncture that nondeveloped property is not always as pristine as it appears.

D. *Lenders*

Lenders face a Catch-22 situation: they cannot afford to lend money to industry without attempting to assure their loan does not go bad, but they cannot risk becoming too involved in the borrower's business. In *United States v. Maryland Bank & Trust Co.*[240] the court specifically noted that banks were in a position to oversee the practices of their borrowers. For a bank to become involved in the borrower's affairs, however, would be "suicidal in this hey day of lender liability."[241] This was made quite clear in *United States v. Mirabile.*[242] Consequently, "[p]rogressive financial institutions are expanding the methods they use to identify high-risk companies,"[243] but identifying the risks, and dealing with them once they are identified, is not always easy.[244]

1. *Pre-Loan Audits*

Pre-loan audits provide the lender with an opportunity to appraise

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238. *See* Handley, *Exports of Waste from the United States to Canada: The How and Why*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10061 (Feb. 1990).

239. *See infra* pp. 807-12.

240. 632 F. Supp. 573, 580 (D. Md. 1986).

241. Address by Professor Philip Lacy, University of South Carolina (Mar. 22, 1988).

242. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994, 20997 (E.D. Pa. Sept. 4, 1985).

243. Murphy, *Environmental Risks Pose Hidden Liabilities*, A.B.A. BANKING J., Apr. 1986, at 96.

244. For a six point checklist of preventive measures, see Gaba, *supra* note 132, § 12.04.

the borrower's existing CERCLA liability risk potential, but it does not assess future liability potential. Nevertheless it is highly recommended.[245] Many executives of borrower companies have the "erroneous belief that their companies have no hazardous waste problems."[246] An audit can prove or disprove that belief and allow the company to address concerns it may not have recognized otherwise. Once companies appreciate their risk of CERCLA liability, they can take steps to reduce the risk of exposure, thus making it less likely that lenders will be left in an unsecure position. In addition, a pre-loan environmental audit might actually identify environmental concerns serious enough to jeopardize the granting of the loan. In these cases, the bank makes a very sound investment in the audit indeed.

For the two reasons described above, borrower informing and borrower selecting, banks have entered the environmental audit arena with unprecedented force, resulting in "a dramatic rise in private inspections."[247] For example, Connecticut Bank & Trust Co. (CB&T) requires, among other investigations, that the prospective borrower "agree to commission soil tests."[248] The cost of these audits transfers to the borrower either directly (as with CB&T) or indirectly (through higher interest rates). In any case, the pre-loan "environmental audit will have to become the lender's most trusted tool."[249]

2. *Continuing Audits*

The continuing audit or, more descriptively, the periodic unannounced audit, has the advantage of keeping the lender informed of the activities of the borrower. This permits the lender to assess his *current* risk as opposed to the risk encountered at the time of the loan. It may also affect the borrower's environmental activities, simply by forcing him to periodically focus on the environmental compliance issue.

The concern with continuing audits rests on their use. If the lender uses the audit to suggest ways the borrower might better reduce liability, then the lender has possibly intruded into the operational

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245. Van Lieshout, *Breaking the Bank: Liability Under Superfund*, 16 REAL EST. REV., Fall, 1986, 51, 55.

246. Shea, *supra* note 66, at 14.

247. *Real Estate Transfers . . .*, Chem. Substances Control (BNA) 3 (Aug. 27, 1987) ("Last year alone, private inspections outnumbered public inspections made by state officials during the previous decade.").

248. Steptoe, *Chemical Waste Complicates Many Land Sales, Financings*, Wall St. J., Nov. 5, 1986, at 39, col. 1.

249. Van Lieshout, *supra* note 245, at 54.

management of the borrower's activities.[250] Such intrusion subjects the lender to joint and several liability for the borrower's CERCLA liability.[251] For most banks, this would be unacceptable.

Independent auditors, required by the lender but paid for by the borrower, have been suggested by some commentators as an alternative to this dilemma.[252] Whether recommendations by these auditors could be construed as an intrusion by the lender into the operational management of the borrower is an open question.[253]

3. *Pre-Foreclosure Audits*

Banks dealing with industrial borrowers have developed a compromise known as the pre-foreclosure audit. While it prevents attachment of CERCLA liability due to operational involvement, it risks abandonment of the lender's security interest. The bank does not know if it has any collateral until the borrower is in default. Although abandonment of the security interest may be undesirable, the lender's interest is in even greater jeopardy if it purchases environmentally impaired property at a foreclosure.

4. *Refusal*

Some commentators have noted that a bank's first reaction to CERCLA liability "is to restrict loans made to industries perceived as subject to environmental risk."[254] Others implicitly support this approach, noting that "[i]t is no coincidence that environmentally related bankruptcies are becoming common."[255] CERCLA liability is having a chilling impact for those trying to obtain industrial development loans.[256] In some cases, lenders simply have avoided taking a security

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250. *See* United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20994 (E.D. Pa. Sept. 4, 1985).

251. Mannino, *Don't Poison Your Portfolio with Toxic Waste*, A.B.A. BANKING J., Aug. 1987, at 83 ("Lenders should avoid getting entangled in the daily operations of any borrower."); O'Brien, *Hazardous Waste Can Create a Legal Mess for Lenders*, BOTTOMLINE, Sept. 1987, at 75, 76 ("If a lender becomes involved in the day-to-day operation and management of a site, it is potentially liable for the entire cost of cleanup.").

252. Shumate, *supra* note 7, at 46 ("The lender's best protection is thorough, periodic environmental audits conducted by a competent independent auditor.").

253. For a list of ten particularly dangerous lender actions, see Mannino, *supra* note 251, at 83.

254. Shea, *supra* note 66, at 13.

255. Klotz & Siakotos, *Lender Liability Under Federal and State Environmental Law: Of Deep Pockets, Debt Defeat and Deadbeats*, 92 COM. L.J. 275, 295 (1987).

256. *Potential Waste Cleanup Liability May Turn Bankers Against Industrial Development Loans*, METALS WK., May 5, 1986, at 3.

interest and have relied on the principals "to give personal guarantees for the amount of the loan."[257]

5. *Insurance*

Environmental impairment liability (EIL) insurance is becoming increasingly desirable.[258] In fact, some banks may require it prior to granting a loan. Banks should be aware, however, that in the current insurance market such a requirement is effectively a refusal to make loan.

E. Insurers

Insurers have taken three basic approaches to reduce their environmental losses. First, they frequently are refusing to insure *any* environmental damage or loss.[259] Second, even when they do agree to some form of environmental insurance, it is limited in scope, usually covering only sudden occurrences.[260] Third, they are auditing their policyholders to assure the risk is minimized.[261]

1. *Refusal*

It is clear that environmental liability insurance is practically nonexistent.[262] What little does exist[263] is mostly accidental, and insurers are working to seal up those accidental loopholes.[264] What may seem surprising is the number of years the insurance industry has been unable to compensate for this void.[265] The General Accounting Office

257. Larsen & Boman, *Environmental Liability: Lender and Landlord Tenant Issues*, in IMPACT ON ENVIRONMENTAL REGULATIONS No. 286, *supra* note 81, at 279.

258. *See* Shumate, *supra* note 7, at 46.

259. *See infra* notes 262-66 and accompanying text.

260. *See infra* notes 267-69 and accompanying text.

261. *See infra* notes 270-72 and accompanying text.

262. *Pollution Insurance: A Financial Responsibility Gap*, Chem. Substances Control (BNA) 3 (Nov. 5, 1987); *Lack of Pollution Insurance Described*, 17 Env't Rep. (BNA) 781 (Sept. 26, 1986); *Environmental Insurance Called "Nightmare": Blame Attributed to Litigation, Superfund Law*, 17 Env't Rep. (BNA) 791 (Sept. 26, 1986). The EPA recently extended the compliance date for financial assurance obligations for underground storage tank owners, primarily due to the difficulty in acquiring insurance. 55 Fed. Reg. 18,566 (May 2, 1990).

263. *Most Hazardous Waste Firms Operating Without Insurance, GAO Finds*, INSIDE EPA (Inside Washington), Nov. 6, 1987, at 13 (only one carrier, the American International Group, is pursuing the environmental impairment liability insurance market).

264. Aldred, *Property Insurers to Reword Pollution Exclusion*, BUS. INS., Feb. 29, 1988, at 28.

265. Bailey, *Working Together to Clean Up America*, INDUS. WK., June 10, 1985, at

(GAO), however, recently released a report which provides an explanation. It asserts that environmental impairment liability insurance is so difficult to find because "[w]aste sites are inevitably going to leak, which is not a 'fortuitous, insurable event.' "[266]

2. *Limited Scope*

Several companies have begun to offer limited environmental insurance.[267] Most of these policies limit the scope of the insurance to "sudden and accidental" events, specifically excluding long-term gradual environmental impairment.[268] Even when risk retention groups can be established to cover some environmental impairment liability, vast areas remain excluded.[269]

Such policies invariably require the potential policyholder "to obtain an independent risk assessment of each site."[270] These initial reviews can be quite extensive, and they will determine whether or not insurance coverage will be made available to the potential policyholder.[271] These reviews are considered so important, even some title insurance companies are requiring such audits.[272]

F. State Governments

1. *ECRA-Type Requirements*

State governments are reacting to CERCLA liability in a number of ways. One way is the development of legislation similar to New Jersey's 1983 Environmental Cleanup Responsibility Act (ECRA).[273]

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14 (identifying an "insurance 'capacity crunch' "); Diamond, *Insurance Against Pollution Is Cut*, N.Y. Times, Mar. 11, 1985, at A1, col. 6 ("nearly all major insurers have decided to reduce or eliminate pollution policies").

266. *GAO Finds Lack of Insurance Carriers for Hazardous Waste Handlers, Facilities*, 18 Env't Rep. (BNA) 1580 (Oct. 23, 1987) (quoting General Accounting Office, *Hazardous Waste: Issues Surrounding Insurance Availability* (GAO/RECD-88-2) (1987)).

267. *Coverage for Some*, Chem. Substances Control (BNA) 2 (Nov. 19, 1987); *United Coastal Insurance Co. Offers Policy to Cover Hazardous Waste Storage Liabilities*, 18 Env't Rep. (BNA) 1630 (Oct. 30, 1987).

268. *Insurance Coverage for "Sudden" Pollution Excludes Long-term Incidents, Court Decides*, 18 Env't Rep. (BNA) 1108 (Aug. 21, 1987).

269. Finlayson, *A&A Drums Up Interest in EIL Facility*, Bus. Ins., Feb. 2, 1987, at 6 (policy excludes acid rain, radon, asbestos, earthquakes, nuclear fuel, and underground storage tanks).

270. *Id.*

271. Dwyer, *Impairment Liability Insurance—Does Your Facility Make the Grade?*, Env't & Waste Mgmt. World, Oct. 1987, at 7.

272. *See* Murphy, *supra* note 243, at 97.

273. N.J. Stat. Ann. §§ 13:1K-6 to -14 (West Supp. 1989).

Connecticut has passed similar legislation,[274] and at least 22 states have proposed legislation.[275]

Basically, ECRA sets up a scheme in which the transferor of industrial property must file with the New Jersey Department of Environmental Protection (NJDEP), 60 days prior to transfer of property, either (1) a site cleanup plan or (2) a "negative declaration." A negative declaration is simply an affidavit certifying that the property is free of environmental impairment. If the declaration proves false or any other noncompliance with ECRA is found, the transferee *or NJDEP* may void the transfer. Furthermore, the transferor becomes strictly liable for cleanup costs and is subject to $25,000 per day in fines. The thrust of the statute is to avoid innocent purchaser liability, but "the cure may be as bad as the disease."[276]

Some of the problems created by ECRA[277] and faced by companies in New Jersey result from the fact that "transfer" includes (1) sale of stock, (2) sale of controlling share of the assets, (3) conveyance of real property (by deed or mortgage foreclosure), (4) dissolution of corporate identity, (5) financial reorganization, or (6) initiation of bankruptcy. Failure to properly complete the ECRA requirements allows the NJDEP to void the sale, potentially frustrating the desires of all parties involved. Even following the letter of the law can frustrate a sale since delays of "several months"[278] have not been uncommon and "no amount of pre-transactional planning will ensure that ECRA approvals can be obtained quickly."[279]

Some companies have charged that ECRA is an unconstitutional interference with federal security laws regarding tender offer, but these companies have failed to persuade the federal district court of New Jersey.[280] Undoubtedly, New Jersey's inclusion of stock transfers in the ECRA statute was prompted by the fact that such transactions can lead to CERCLA liability for unsuspecting parties.

The problems presented by ECRA with regard to real estate transfers has eased recently in New Jersey, partly through a change in ad-

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274. CONN. GEN. STAT. ANN. §§ 22a-134 to -134d (West Supp. 1990) ("Transfer Act").

275. Mulcahy, *supra* note 6, at 5. For a comparison of the proposed statutes and bills, see Weisman, *The Implications of Environmental Law on Business Transactions; New Trends*, in IMPACT OF ENVIRONMENTAL REGULATIONS No. 286, *supra* note 81, at 9, 19-26.

276. Shumate, *supra* note 7, at 45.

277. For a concise summary of ECRA, see Nucciarone, *ECRA: Its Provisions*, in IMPACT OF ENVIRONMENTAL REGULATIONS No. 286, *supra* note 81, at 29.

278. *Id.* at 33.

279. *Id.* at 35.

280. *See ECRA Meets the Challenge*, Chem. Substances Control (BNA) 2 (January 15, 1987).

ministrative priorities. The successes of the Act, however, are unlikely to diminish.

2. *Notice Requirements*

The Resource Conservation and Recovery Act (RCRA)[281] requires owners of property used as a Hazardous Waste Disposal Facility to record that information in the deed.[282] Several states have expanded this rule by requiring the seller to provide notice to the buyer of environmental impairments in *any* property. Unlike ECRA, however, the rules usually do not require any certification with a state agency and they do not necessarily provide for voiding of the transfer. Failure to provide the information is a misrepresentation, however, entitling the purchaser to the associated remedies.[283]

3. *Superliens*

At least six states, Arkansas,[284] Connecticut,[285] Massachusetts,[286] New Hampshire,[287] New Jersey[288] and Tennessee[289] have enacted superlien provisions,[290] and Minnesota has considered a superlien bill.[291] A superlien gives the state "first-priority lien against property subject to a cleanup,"[292] regardless of any security interests filed prior to the state's lien. In most cases the cost of cleanup exceeds the value of the property, so mortgage liens are effectively erased.[293]

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281. 42 U.S.C. §§ 6901-6992k (1982 & Supp. V 1987).

282. *See* 40 C.F.R. § 264.119(b)(1) (1989).

283. *See* Dean, *How Hazardous Waste Statutes Influence Real Estate Transactions*, 18 Env't Rep. (BNA) 933, 934 (July 31, 1987) (comparing the laws of Massachusetts, MASS. GEN. LAWS. ANN. ch. 21c, § 7 (West 1981 & Supp. 1990); Minnesota, MINN. STAT. ANN. § 115B.16 (West 1987); Pennsylvania, 35 PA. CONS. STAT. ANN. §§ 6018.405, .601-.607 (Purdon Supp. 1989); and West Virginia, W. VA. CODE § 20-5E-20 (Michie 1989)); *see also* Stever, *ECRA and Other Restrictions on the Transfer of Hazardous Waste Sites*, in IMPACT OF ENVIRONMENTAL REGULATIONS No. 316, *supra* note 33, at 149, 152.

284. ARK. STAT. ANN. §§ 8-7-417, -514, -516 (Michie 1987 & Supp. 1989).

285. CONN. GEN. STAT. ANN. § 22a-452a (West Supp. 1990).

286. MASS. GEN. LAWS ANN. ch. 21E, § 13 (West Supp. 1990).

287. N.H. REV. STAT. ANN. § 147-B:10-b (Equity Supp. 1989).

288. N.J. STAT. ANN. § 58:10-23.11f(f) (West Supp. 1989).

289. TENN. CODE ANN. § 68-46-209 (Michie Supp. 1989).

290. *See* Cohen, *Hazardous Waste: A Threat to the Lender's Environment*, 19 U.C.C. L.J. 99, 115-23 (1986) (reviewing 11 state superlien statutes).

291. *Attorney General Proposes State Liens for Those Who Cannot Repay Cleanup Costs*, 18 Env't Rep. (BNA) 1936 (Dec. 18, 1987).

292. Dean, *supra* note 283, at 935.

293. *Id.*

Superliens are established, in part, to offset CERCLA's requirement of state contribution (minimum ten percent) to the cleanup costs within its borders.[294] The superlien permits states to recover (sometimes) part of the cost from the sale of the cleaned property, but it does so at the expense of any other lien holder. The states which react to superfund with a superlien provision do so in an effort to shift the burden onto another party. In this case, the recipients of the burden (usually banks) perceive this as another hazard to hazard lending. Superliens augment an already substantial justification to treat industrial loans with suspicion.

Even without superliens, if a bankruptcy[295] petition is filed, states may be successful in recovering cleanup costs[296] as administrative expenses.[297] In *Lancaster v. Tennessee* (*In re Wall Tube & Metal Products Co.*)[298] the Sixth Circuit held "it proper that the response costs incurred by Tennessee and recoverable under CERCLA be deemed an administrative expense."[299] In reversing the district court's affirmance of the bankruptcy court's decision, Judge Keith relied on the Supreme Court's rationale in *Ohio v. Kovacs*[300] and *Midlantic National Bank v. New Jersey Department of Environmental Protection.*[301]

Based on his reading of *Kovacs*, Judge Keith determined that the bankruptcy trustee had a duty to " '*comply with the environmental laws of the State.*' "[302] Citing *Midlantic*, he found that " '*the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety.*' "[303] As might be expected, these rulings have sent reverberations of concern throughout the creditor community.[304] Likewise, the legal community has latched onto the conflict between bankruptcy and environmental

294. *See* CERCLA § 104(c)(3)(C)(ii), 42 U.S.C. § 9604(c)(3)(C)(ii) (1982 & Supp. V 1987).

295. For a brief discussion of the nonbankruptcy, nonsuperlien situation, see Baird, *Environmental Regulation, Bankruptcy Law, and the Problem of Limited Liability*, in BURDENS OF ENVIRONMENTAL REGULATION, *supra* note 45, at 4, 5.

296. For a breakdown of sample cleanup costs, see Gaba, *supra* note 132, at 13-65, app. E.

297. Lancaster v. Tennessee (*In Re* Wall Tube & Metal Prods. Co.), 831 F.2d 118 (6th Cir. 1987).

298. 831 F.2d 118 (6th Cir. 1987).

299. *Id.* at 123.

300. 469 U.S. 274 (1985).

301. 474 U.S. 494 (1986).

302. *Wall Tube*, 831 F.2d at 122 (quoting *Kovacs*, 469 U.S. at 285) (emphasis in *Wall Tube*).

303. *Id.* at 121-22 (quoting *Midlantic*, 474 U.S. at 502) (emphasis in *Wall Tube*).

304. *Sixth Circuit Gives Tennessee Priority in Claim for Costs from Bankrupt Company*, 18 ENV'T REP. (BNA) 1574 (Oct. 23, 1987); *Tennessee: Priority Creditor*, Chem. Substances Control (BNA) 3 (Nov. 5, 1987).

law[305] with a synergetic fervor that outpaces even the rapid growth of these two areas of law in the past decade.[306]

G. Local Governments

Local government reaction generally has been subdued—but it certainly exists. Purchasers of industrial property, especially in urban areas, should be sure to check for local regulations. At least two local governments, San Francisco, California[307] and Dade County, Florida,[308] have considered real estate transaction ordinances.

H. Federal Government

Perhaps the most telling reaction to CERCLA liability by the federal government can be found in CERCLA's amendments. The Superfund Amendments and Reauthorization Act (SARA),[309] known in some circles as "Hurricane SARA,"[310] reaffirms the CERCLA liability scheme virtually in its entirety. SARA's impact generally extends,[311]

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305. Schwenke, *Welcome*, in BURDENS OF ENVIRONMENTAL REGULATION, *supra* note 45, at 1 ("Bankruptcy law, the cleanup of hazardous waste sites, and secured creditors' rights have come into increasing conflict.").

306. *See, e.g.*, Cosetti & Friedman, Midlantic National Bank, Kovacs, *and* Penn Terra*: The Bankruptcy Code and State Environmental Law—Perceived Conflicts and Options for the Trustee and State Environmental Agencies*, 7 J.L. & COM. 65 (1987); Shanker, *A Bankruptcy Superfund for Some Super Creditors*, 61 AM. BANKR. L.J. 185 (1987); Note, *Bankruptcy Trustee's Abandonment of Burdensome Estate Property and State Environmental Protection Laws:* Midlantic National Bank v. New Jersey Department of Envionmental Protection, *106 S. Ct. 755 (1986)*, 55 U. CIN. L. REV. 853 (1987); Note, *Bankruptcy: Restrictions on Abandonment of Burdensome Property*—Midlantic National Bank v. New Jersey Department of Environmental Protection, 20 CREIGHTON L. REV. 165 (1986).

307. *See* San Francisco, Cal., Ordinance 253-86 (June 9, 1986).

308. Proposed rule published in Earl, *Local Government's Role in Hazardous Waste—Can Traditional Zoning Police Power Now Extend to the Boardroom and to the Closing Table?*, in BURDENS OF ENVIRONMENTAL REGULATION, *supra* note 45, at 33, 35.

309. For a thorough, but easy to pinpoint, analysis of the effect of SARA provisions on CERCLA, see Brown, Harris & Dudley, *A Side by Side Comparison of Liability Provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the House and Senate Versions of the 1986 Superfund Reauthorization Legislation and the Superfund Amendments and Reauthorization Act of 1986*, in SUPERFUND: THE 1986 AMENDMENTS (Practicing Law Institute Litigation and Administrative Practice No. 315) 357 (Brown ch. 1986).

310. *See* Bayko & Share, *Stormy Weather on Superfund Front Forecast as "Hurricane SARA" Hits*, Nat'l L.J., Feb. 16, 1987, at 24.

311. For example, SARA provided nationwide service of process and clear language of intent to abrogate states' eleventh amendment immunity to suit in federal court. Brown, Harris & Dudley, *supra* note 309, at 45.

rather than inhibits,[312] CERCLA liability.

While Congress continues the CERCLA rampage, the EPA has developed a scheme for releasing PRPs from liability—for a price.[313] These so-called "covenants not to sue" permit the EPA to settle cases with certain PRPs without commencing litigation.[314] The covenant, however, is effective as to only certain PRPs and the EPA preserves its cause of action against others. The EPA has tremendous leverage in negotiating the covenants and they invariably have reopener clauses that permit the EPA to charge additional costs should costs at the sites exceed the EPA's preliminary estimates.[315] Nevertheless, some PRPs like the cash out method because it allows them to resolve the problem quickly.

Even the federal government is beginning to scrutinize closely its own property transfers: the EPA has been reviewing a draft of proposed regulations.[316] Likewise, local governments are being encouraged "to follow the example of private industry and start auditing the environmental sta[t]us of the property before they foreclose or buy."[317]

IV. Impact of CERCLA Burdens on Site Selection

This section of the Article focuses on CERCLA burdens as they affect the advantages of purchasing nonindustrial property rather than existing industrial property. This analysis proceeds from the reactions of the various parties previously discussed.

A. Existing Industrial Property Versus Virgin Property

The respective advantages of existing industrial property and nonindustrial property can be broken into three parts. The first part involves the purchase or acquisition itself. The second and third parts

312. One of the few liability inhibiting provisions in SARA provided a negligence standard of liability for engineering contractors who clean up existing Superfund sites. *Id.* at 61.

313. *EPA "Covenant Not to Sue" May Shelter PRPs From Liability*, Superfund Report (Inside Washington) 1 (June 10, 1987).

314. Even the courts are supportive of the EPA's efforts to reduce litigation by encouraging covenants not to sue. *See* United States v. Outboard Marine Corp., 789 F.2d 497 (7th Cir. 1986)

315. *See supra* text accompanying note 37.

316. *See Federal Facility-Property Transfers*, Superfund Report (Inside Washington) 4 (June 10, 1987); *see also* Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property, 55 Fed. Reg. 14,208 (Apr. 16, 1990).

317. Steinzor, *Local Governments and Superfund: Deciding Just Who Will Pay the Tab*, Nat'l L.J., Nov. 16, 1987, at 22.

involve the related subjects of insurance acquisition and lender availability.

1. Purchase/Acquisition

a. Relative Risk

Whether the property is an existing industrial site or apparently virgin land, the purchaser faces an unknown environmental liability risk.[318] The likelihood that the risk will be substantial seems greater if the location has hosted prior industrial activity. In any case, the cost of surveying an industrial facility for environmental impairment far exceeds the cost of uncovering any activities on apparently virgin soil. Hence, the least expensive means of reducing the risk today is development of virgin land.

b. Potential for Misrepresentation

As noted earlier, an owner who knows of hazards or potential hazards, may be inclined to sell contaminated property to a buyer with deeper pockets.[319] And while brokers have been held liable under a negligence standard,[320] they still have an incentive for downplaying the negative aspects of a property purchase.[321] The potential for misrepresentation lurks behind any transaction, but the probability of it surfacing after the purchase is much greater with existing industrial property than with virgin land. Certainly the failure of any attorney involved in a real estate transaction to alert his client to the potential for environmental liability could be construed as malpractice.

c. Transaction Costs and Delays

While transaction costs and delays for audits of industrial facilities may be expected, ECRA-type statutes can create additional delays. In some cases these delays may be substantial enough to justify selection

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318. Note, *Hazardous Waste and the Innocent Purchaser*, 38 U. FLA. L. REV. 253, 254 (1986) ("Even the most prudent purchasers cannot confidently acquire property free of potential hazardous waste liability.").

319. *See supra* notes 216, 222-23 and accompanying text.

320. *See* Ryon, *supra* note 104, at 6.

321. *See* Ewing, *Recycling a Tainted Ohio Tract*, N.Y. Times, Sept. 27, 1987, § 8, at 1, col. 1 (comparing two North Carolina brokers handling of two similar parcels of land after PCB cleanup; broker who disclosed is still trying to sell the property, while the one who withheld information has sold his parcel).

of undeveloped property that requires no delay.[322]

Even without ECRA provisions, the cost of audits coupled with delays must be factored into the decision to purchase an existing site. Further, if the audit reveals environmental problems, additional delays will be encountered while a remedy is negotiated and either implemented or purchase of the site is abandoned. Abandonment at this stage, however, entails considerable delay.

Should the purchase of a suspect site be considered, the means of solving any future problems must be analyzed and negotiated. This consumes additional expense in the form of legal fees for drafting provisions for the contract of sale. Furthermore, these provisions can be quite sophisticated and may require significant additional engineering and scientific analysis of the facility.

On the whole, substantial prepurchase costs generally are encountered by the industrial site purchaser. Moreover, these costs do not always prevent later costs or delays. In comparison, nonindustrial land offers minimal initial costs and virtual assurance that any future environmental problems will be due to the buyer's activities at the site, and thus will be preventable.

2. *Insurance*

Purchasers of any property will find retroactive environmental impairment liability insurance completely unavailable.[323] The purchaser of virgin property can take solace in the fact that he should not need it; the purchaser of an existing industrial site enjoys no such comfot.

For the limited-scope insurance that is available, the existing site purchaser can expect to pay for an extensive initial audit. Additionally, to cover the possibility that the audit missed something, the existing site purchaser will face higher insurance premiums for the life of the policy.[324]

In sum, the existing site carries a hidden cost that includes self-insurance to cover past activities plus the cost of higher premiums to cover activities prospectively. A real possibility exists that no insurance will be available at all, and that the purchaser must fully self-insure.

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322. "[P]eople who want to construct new facilities on old sites . . . must make sure that the soil is cleaned up to ECRA guidelines. As a result, they may be precluded from using the site because it will take years before the building can be built." Highland, *Can Someone Else Besides a Lawyer Determine Who Really Is Innocent?*, in BURDENS OF ENVIRONMENTAL REGULATION, *supra* note 45, at 25; *see also supra* note 280 and accompanying text.

323. *See supra* note 262 and accompanying text.

324. *See supra* notes 271-72 and accompanying text.

3. Lenders

Obviously, lenders have concerns as well.[325] While refusal to service all industrial site purchasers is not realistic,[326] careful selection of purchasers is crucial. Therefore, the prospective borrower must face the possibility of refusal of loan applications simply on the basis of environmental considerations. As part of the application process, the lender may require an independent audit, which adds to cost and increases delay. Furthermore, in an effort to mitigate the risk of a deficient audit, lenders often will charge higher interest rates. Finally, the lender may condition the loan on the successful purchase of environmental impairment liability insurance, which, as noted previously, sometimes is difficult, if not impossible, to obtain.

B. Result

The industrial site purchaser must consider many factors when locating a new facility, but environmental concerns are foremost among them. Unquantifiable risk presents a tremendous barrier to any proposed sale. To quantify the risk requires travelling down at least one of two avenues, although some combination would seem most likely. The first requires extensive investigation; the second requires a form of indemnification. Both result in increased transaction costs and delays. Furthermore, in some cases adequate indemnification from the seller or an independent insurer may be unavailable. This potential for no indemnification coupled with possible long-term financing at an increased interest rate make it unlikely that a purchaser will look favorably on an existing industrial site.

Instead, the purchaser will opt for the virgin site if financially feasible, since infrastructure and facility construction costs, while not cheap, are readily ascertainable. Although CERCLA liability propels caution even in the purchase of apparent virgin locations, the increase in transactional costs and delays simply is not comparable. The virgin site provides quantifiable risk and an opportunity for the industrial facility to start with a clean slate.

The full cost of CERCLA liability promotes consumption of virgin property over existing industrial property, even when existing sites may appear, on the surface, less expensive. While the purchaser may not realize the source of the influences that are compelling this choice, the purchaser must nevertheless respond to it.

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325. *See supra* notes 240-58 and accompanying text.
326. *See supra* notes 254-57 and accompanying text.

C. *Proposal*

States considering some form of ECRA, Superlien, or Notice type of legislation should simultaneously consider the impact such laws have on consumption of undeveloped land. This Article recommends a concept for reducing the negative impact CERCLA has on industrial site selection. This proposal makes two assumptions.

First, it assumes that reuse of industrial property is socially more desirable than abandonment. Some arguments exist that public health could be better protected if such property were abandoned, rather than subjected to possibly ineffective cleanup.[327] Additionally, the cost of remedial work might be greatly reduced if cleanup standards eventually become post-cleanup use-conscious, and if the post-cleanup use were designated to prevent human occupancy. However, the unrelenting downward trend of required cleanup levels, preventing both cost reductions and worker injury, defeat both of these arguments. Therefore the assumption remains valid.

Second, the proposal assumes that consumption of virgin land is undesirable. In states of currently limited industrial capacity, with little to offer growing industry in the way of existing industrial sites, consumption of virgin land may be preferred over expansion out of state. But any existing locations can be effectively cleaned and reused, if enough impetus is brought to the market.[328]

The proposal consists simply of a one time tax or impact fee on undeveloped property collected in the year the land is converted to industrial use. Industrial use would be defined by selected standard industrial classification schemes, with the provision that companies could rebut the presumption that they purchase, use, manufacture, generate, store, transport or dispose of hazardous substances. Since almost all industry uses some hazardous substances, a scale might be developed that would tax heavier users more, thereby encouraging minimization. Again, this could be set up on a presumptive basis imposing a set tax, but deductions for minimization would be available.

The tax proceeds could be used to offset costs of redeveloping existing industrial sites through the funding of state superfunds—at least to the extent permitted by *Exxon Corp. v. Hunt*.[329] In *Exxon* the court

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327. For example, the EPA has proposed removal of a contaminated site from the National Priorities List (NPL) without cleanup. *See EPA Region III Proposes to Remove Pennsylvania Site from NPL Without Cleanup*, 20 Env't Rep. (BNA) 1868 (Mar. 16, 1990).

328. *See* Lehman, *Toxic Waste Poses Problem For Developers*, Washington Post, Feb. 21, 1987, at E1, col. 6 (Timberline condominium project sits on a cleaned midnight dump site.).

329. 475 U.S. 355 (1986).

permitted the use of special state taxes only to the extent that they do not overlap with the CERCLA Superfund.[330] This permits states to tax for the ten percent minimum cleanup cost burden CERCLA places on the states. Congress apparently tried to overturn the Supreme Court's limitation by deleting from CERCLA the language cited by the court.[331] The New Jersey Supreme Court apparently believed this to be the case, avoiding the United States Supreme Court's instructions on remand.[332]

South Carolina, for example, currently funds its state superfund program from taxes on commercial hazardous waste land disposal within the state.[333] But this approach suffers from disposal-oriented problems.[334] As a deterrent to waste production, the state's current "rear-end" approach relies on the "trickle-up" theory that future liability will compel disposers to act responsibly today. Of course this theory presumes knowledge, not only of liability, but of ways to act responsibly, *after* the waste is generated. Obviously, waiting until this late stage severely limits the number of options available.

A more sound approach would encourage the potential generator to evaluate his activities *before* the waste is generated. An undeveloped land impact fee for hazardous substance users would have this additional beneficial effect. Furthermore, it would allow the opportunity to reduce (or avoid future increase of) taxes on waste-end disposal. Such taxes have always been a concern, since they may drive proper disposal costs up to a point at which some generators may be encouraged to improperly dispose. Another interesting effect of the impact fee on the conversion of undeveloped property is that it allows the fiscal resource base to be tied automatically to the growth in hazardous substance activity.

V. Conclusion

CERCLA mobilizes the marketplace to force hazard abatement. Banks and insurance companies now demand that their borrowers and policyholders reflect the true cost of their production activities, including environmental impairment, in their operating budgets. Companies no longer are able to easily externalize these costs. The marketplace

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330. *Id.* at 376.

331. *See* 132 Cong. Rec. S14912 (daily ed. Oct. 3, 1986) (statement of Sen. Lautenburg).

332. *See* Exxon Corp. v. Hunt, 109 N.J. 110, 126, 534 A.2d 1, 9-10 (1987).

333. Address by Roger Davis, vice president, GSX Services, University of South Carolina Environmental Law Society (Mar. 31, 1988).

334. For a good general discussion of potential disposal oriented problems, see Note, *supra* note 184.

now works to prohibit transferring these costs from the profit-maker onto the unsuspecting, taxpaying public without public consent. This radically alters a previous "right" to literally dispose of one's real property as one sees fit. The marketplace now attaches responsibility, in conjunction with rights, to the ownership of real property. This has wrenched the activities of hazardous substance producing and consuming companies, creating an economic climate that deters future mishandling of hazardous substances.

Unfortunately, while CERCLA unleashed marketplace forces for protection of the environment, it inadvertently created marketplace incentives to consume undeveloped land. Simple removal of these incentives would undo the progress that CERCLA has achieved for the environment. Therefore, the incentives to consume virgin land must be counterbalanced by new disincentives. Such disincentives might include conversion impact fees, which would require a payment for the right to use previously noncommercial property for activities that would produce or consume hazardous substances. If disincentives alone are politically unpalatable, they may be combined with incentives to redevelop existing commercial locations.